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IN THE

Supreme Court of the United States

October Term 1976

No. 76-1640

GENERAL ATOMIC COMPANY, A partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,

Petitioner,

vs.

THE HONORABLE EDWIN L. FELTER, District Court Judge for the First Judicial District, Santa Fe County, New Mexico,

Respondent.

GENERAL ATOMIC COMPANY, A partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,

Petitioner,

vs.

UNITED NUCLEAR CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

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Opinions and Orders Below

This petition by General Atomic Company ("GAC") is a direct continuation of Cause No. 76-385, in which this Court granted GAC's petition seeking writs of certiorari directed to (a) the District Court of the First Judicial District, County of Santa Fe, New Mexico (the "Santa Fe Court"), to review its order of injunction dated April 2,

1976 (the "Injunction"), and (b) the New Mexico Supreme Court, to review its order entered June 16, 1976, in which that court quashed as improvidently granted an alternative (temporary) writ of prohibition directed to the Santa Fe Court, thereby leaving the Injunction in effect.

The Injunction restrains GAC and its constituent partners from exercising rights granted by the Federal Constitution, federal statutes and the Federal Rules of Civil Procedure:

> "General Atomic Company, its partners, privies, agents, servants and employees, are hereby preliminarily enjoined and prohibited from filing or prosecuting any other action or actions against United Nuclear Corporation in any other forum relating to any rights, claims or the subject matter of this action. This injunction prohibits the institution or prosecution of ordinary litigation, third party proceedings, cross-claims, arbitration proceedings or any other method or manner of instituting or prosecuting actions, claims or demands relating to the subject matter of this lawsuit, or including United Nuclear Corporation as a party thereto."

GAC's petition to this Court in Cause No. 76-385 (the "Prior Petition") asserted that the Injunction was in direct conflict with the Supremacy Clause and in particular with this Court's holding in *Donovan* v. *Dallas*, 377 U.S. 408 (1964).

On November 29, 1976, this Court granted the Prior Petition, vacated the judgment of the New Mexico Supreme Court and remanded the cause to that court to consider whether the judgment was based upon federal or state grounds, or both. On February 21, 1977, in response to the mandate of this Court, the New Mexico Supreme Court reaffirmed the judgment vacated by this Court and left

the Injunction in effect, holding that the Injunction was not in conflict with *Donovan*. Accordingly, GAC now seeks a writ of certiorari directed to the New Mexico Supreme Court to review that court's order rejecting GAC's constitutional claims.*

The Injunction of the Santa Fe Court is annexed hereto as Appendix A. That court set forth its reasons for granting the Injunction in a letter to the parties dated March 29, 1976, annexed hereto as Appendix B. This Court's mandate dated December 28, 1976, is annexed hereto as Appendix C. The opinion and order of the New Mexico Supreme Court entered on February 21, 1977, is annexed hereto as Appendix D.

Jurisdiction

The opinion and order of the New Mexico Supreme Court was entered on February 21, 1977.** This Court has jurisdiction to issue a writ of certiorari under 28 U.S.C. § 1257(3).

This Court remanded this cause to the New Mexico Supreme Court "to consider whether the judgment is based upon federal or state grounds, or both." The February 21, 1977, order and opinion of the New Mexico Supreme Court makes clear beyond any doubt that its decision to leave the Injunction in effect was squarely based on the federal ground presented by the Prior Petition. The New Mexico Supreme Court expressly decided that "the injunction here is not contrary to the Donovan holding" in

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* Since this Court's order and mandate did not expressly dispose of GAC's petition for a writ of certiorari directed to the Santa Fe Court, GAC also renews its request for such relief (*see* Prior Petition, p. 5).

** On March 4, 1977, the New Mexico Supreme Court entered an order making its February 21, 1977, order final.

concluding that the Santa Fe Court had jurisdiction to issue the Injunction (Appendix D, p. 9).

Questions Presented

1. Can a state court in an *in personam* action constitutionally enjoin a defendant from instituting an action in a federal court?

2. Can a state court in an *in personam* action constitutionally enjoin a defendant from impleading or moving to join the state court plaintiff as a party in a federal court action previously instituted against the defendant by a different party, pursuant to Fed. R. Civ. P. 14 or 19(a)?

3. Can a state court in an *in personam* action constitutionally enjoin a defendant from (a) seeking to enforce its rights under the Federal Arbitration Act to require the state court plaintiff to arbitrate or (b) asserting claims against the state court plaintiff in a pending arbitration ordered by a federal court pursuant to said Act?

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions involved include U.S. Const. art. III, § 1, U.S. Const. art. VI, 28 U.S.C. § 2072 and 9 U.S.C. §§ 2 and 4, which provide in relevant part:

U.S. Const. art. III, § 1:

> "The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish. . . ."

U.S. Const. art. VI:

> "This Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding."

28 U.S.C. § 2072:

> "The Supreme Court shall have the power to prescribe by general rules the forms of process, writs, pleadings, and motions and the practice and procedure of the district courts and courts of appeals in civil actions . . . ."

9 U.S.C. § 2:

> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, of an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

9 U.S.C. § 4:

> "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement,

would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . ."

Also involved are Fed. R. Civ. P. 14(a) and 19(a), which provide in relevant part:

Fed. R. Civ. P. 14(a):

"When Defendant may Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. . . ."

Fed. R. Civ. P. 19(a):

"Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party."

Statement

Litigation Prior to the Injunction*

The action below is one of several lawsuits arising from five contracts entered into by UNC and four utilities providing for the supply by UNC of uranium and uranium fuel assemblies ("the utility contracts"). Thereafter, GAC succeeded to UNC's rights and obligations under the utility contracts and, pursuant to a 1973 Uranium Supply Agreement, UNC became obligated to supply to GAC uranium required under the five utility contracts.** The 1973 Uranium Supply Agreement provides:

"UNC shall sell to the Corporation [GUNFC, now GAC] and the Corporation shall purchase from UNC all the Concentrates (including those concentrates to be used in reload fuel assemblies to be fabricated by the Corporation) which the Corporation is required to supply pursuant to the . . . [utility contracts]. . . . The Concentrates . . . shall be provided in accordance with the terms and conditions, including price, of the applicable [utility contract], as re-

* To avoid unecessary repetition, GAC respectfully refers the Court to the Prior Petition and to GAC's Prior Reply in Support of Petition (the "Prior Reply") for a more detailed statement of the relevant factual background to this action.

** The utility contracts were assigned by UNC to Gulf United Nuclear Fuels Corporation ("GUNFC"), formed by UNC and Gulf Oil Corporation ("Gulf"). In connection with the assignments, UNC guaranteed GUNFC's performance of the utility contracts, remained obligated to supply uranium to the utilities on three of the five contracts and entered into a Uranium Supply Agreement with GUNFC which obligated UNC to supply to GUNFC the uranium required on all five of the utility contracts. In 1973, Gulf bought out UNC's interest in GUNFC and the parties entered into a modified agreement, the 1973 Uranium Supply Agreement, which, *inter alia*, obligated UNC to supply to GUNFC uranium called for by the utility contracts. Thereafter, Gulf and Scallop Nuclear, Inc., formed GAC, and Gulf assigned to GAC its rights and obligations under the 1973 Uranium Supply Agreement and the utility contracts.

quired by the buyer and as specified in this Agreement."

In 1975, after a fivefold increase in the market price of uranium, UNC sought to avoid further performance of its obligations to supply uranium to GAC at contract prices. UNC withheld further delivery and brought a declaratory judgment action against GAC and its constituent partners in the Santa Fe Court, alleging, *inter alia*, mutual mistake, breach of contract and commercial impracticability.

GAC's great concern was to avoid the threat of inconsistent adjudications posed by the UNC litigation and UNC's refusal to supply the required uranium, on the one hand, and threatened litigation by the utilities seeking to compel GAC to perform the utility contracts originally made by UNC, on the other. GAC therefore promptly sought to have the entire controversy determined in a single federal forum. On January 19, 1976, GAC filed a complaint in interpleader and in the nature of interpleader pursuant to 28 U.S.C. § 1335 in the New Mexico Federal District Court. The complaint named UNC and the four utilities as defendants and sought determinations binding on all parties as to their respective rights and obligations under the 1973 Uranium Supply Agreement and the utility contracts.

Unfortunately, GAC's effort to obtain a consistent adjudication of the disputes among all of the parties was unsuccessful. On March 2, 1976, on motion of UNC and all of the utilities, the District Court dismissed the interpleader action on the ground that technical subject matter jurisdiction under the interpleader statute was lacking.*

* On April 8, 1977, the dismissal was affirmed by the United States Court of Appeals for the Tenth Circuit.

On January 23, 1976, Gulf had filed an action in the New Mexico federal court for a declaration of the validity of a release by UNC of certain claims against Gulf given in connection with Gulf's buy-out of UNC's interest in GUNFC. That action was dismissed on September 29, 1976, on the ground that the narrow issue presented by Gulf's action could be decided in the Santa Fe litigation.

Having successfully resisted GAC's effort to resolve the disputes in a single action, the utilities pressed their claims against GAC in separate forums. By early March 1976, the utilities had instituted the following litigation against GAC:

—*I&M v. GAC,* an action for damages and specific performance in New York federal court by the Indiana and Michigan Electric Company ("I&M");

—*Commonwealth Edison v. GAC,* a demand for arbitration and an action to compel arbitration in Illinois federal court by Commonwealth Edison Company ("Commonwealth"); and

—*Duke Power v. GAC,* a demand for arbitration in North Carolina by Duke Power Company ("Duke").

Neither I&M nor Duke attempted to join UNC in those proceedings, although UNC guaranteed performance of both utility contracts and remains directly liable to I&M on the I&M contract. Commonwealth, on the other hand, named UNC as a party along with GAC.

The Santa Fe Injunction

UNC, for its part, quickly moved to prevent GAC from impleading UNC in each of the utility proceedings, as GAC desired to do in order to avoid the threat of inconsistent adjudications in its disputes with UNC and each of the utilities. On March 15, 1976, warned by I&M that GAC might try to implead UNC in the New York federal action pursuant to Fed. R. Civ. P. 14, UNC obtained *ex parte* from the Santa Fe Court a temporary restraining order restraining GAC and its constituent partners from "instituting suit or filing a third-party complaint against United Nu-

clear".* On April 2, 1976, after hearing, the Santa Fe Court issued the Injunction.**

On April 14, 1976, GAC obtained an alternative writ of prohibition from the New Mexico Supreme Court, prohibiting the Santa Fe Court "from taking any action to enforce . . . [the Injunction] until the further order of this Court". However, on June 16, 1976, the New Mexico Supreme Court—immediately after argument and without giving any reasons—quashed the writ "as improvidently granted".

On September 14, 1976, GAC petitioned this Court for writs of certiorari to the New Mexico Supreme Court and the Santa Fe Court, seeking review of the Injunction and of the order of the New Mexico Supreme Court leaving the Injunction in effect. On November 29, 1976, this Court granted the Prior Petition and, without further briefing or argument, vacated the judgment of the New Mexico Supreme Court and remanded the cause to that court to consider whether its judgment was based upon federal or state grounds, or both. This Court's mandate was filed in the New Mexico Supreme Court on January 3, 1977.

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* I&M's warning initiated a curiously cooperative course of conduct towards UNC. In 1975, UNC had instituted an action against I&M in a different New Mexico state court, seeking to avoid its direct obligations to I&M under the I&M contract. After this action was removed by I&M to federal court, I&M counterclaimed to enforce the contract and for damages. Yet, on April 9, 1976, just days after UNC had obtained the Injunction, UNC and I&M agreed to an indefinite stay of the action by UNC against I&M. Thereafter, UNC and I&M sought to litigate against GAC only in separate forums and successfully resisted GAC's effort to intervene in the New Mexico federal action, in which UNC and I&M both were parties (*see* Prior Petition, pp. 10-15; Prior Reply, pp. 8-9).

** The federal interpleader action (which already had been dismissed) and Gulf's declaratory judgment action were exempted from the Injunction on the ground that those actions already were pending against UNC when the Injunction was sought. No exemption was made for the pending litigations instituted against GAC by I&M, Commonwealth and Duke, nor for the action instituted by UNC against I&M pending in New Mexico federal court.

In response to this Court's mandate, the New Mexico Supreme Court rendered its opinion and order of February 21, 1977, reaffirming its prior judgment on the ground that the Injunction did not conflict with *Donovan* and hence was within the inherent equity jurisdiction of the Santa Fe Court to issue.

Current Status of Utility Litigation

The course of developments in the pending litigations instituted by the utilities against GAC demonstrates that the Injunction has severely hampered GAC's efforts to defend itself. Indeed, the United States Court of Appeals for the Tenth Circuit, even while feeling constrained to affirm dismissal of the interpleader action, took pains to emphasize the prejudice to GAC caused by the piecemealed litigation:

> "We are acutely aware that the plaintiff finds itself in a most difficult trap. We are also aware that the public interest might well be served if all of the lawsuits could be brought together under a single roof. As the plaintiff points out, it is threatened with not only a number of lawsuits, but conflicting adjudications. The problem from our standpoint is that we must decide the case within the framework of the interpleader statute in view of the obvious limiting principle that federal courts are courts which are dependent upon Congress for the exercise of subject matter jurisdiction. The only jurisdictional offering is the interpleader statute and our decision must be made in terms of its specific criteria."*

I&M Litigation. GAC moved to dismiss the I&M action, pursuant to Fed. R. Civ. P. 19 and 14, on the ground

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* *General Atomic Co.* v. *Duke Power Co., et al.*, — F.2d — (10th Cir. No. 76-1152, filed April 8, 1977). A copy of the slip opinion of the United States Court of Appeals for the Tenth Circuit has been lodged with the Clerk of this Court.

that UNC was a necessary party who could not be joined because of the Injunction. That motion was initially denied by the New York federal court (*see* Prior Petition, pp. 10-11; Prior Reply, pp. 9-11). Thereafter, GAC renewed its motion to dismiss. Upon GAC's undertaking to attempt to join I&M in the Canta Fe action, Judge Frankel granted GAC's renewed motion. In an opinion dated January 5, 1977, Judge Frankel held that "[i]n equity and good conscience, the court cannot countenance the continuation of this lawsuit without the presence of UNC when to do so would likely result in duplicative litigation, possible prejudice, and incomplete resolution of the matters at issue."*

On January 21, 1977, I&M, at GAC's request, was ordered joined as a defendant in the Santa Fe action.

Thus, GAC ultimately was able to avert the threat of inconsistent adjudication posed by the Injunction against joinder of UNC in the I&M federal court action, but only by forsaking its right to litigate its disputes with I&M in a federal forum.

Detroit Edison Litigation. In view of prior instances in which a utility had sued GAC alone in one forum while UNC raised issues with respect to that utility in the Santa Fe litigation, GAC feared that Detroit would sue it in a Michigan court while GAC was restrained by the Injunction from impleading UNC. Accordingly, GAC moved on December 8, 1976, to join Detroit as a defendant in the Santa Fe action and, on January 21, 1977, such joinder was ordered. Detroit has appealed from this order, asserting that it is not subject to the jurisdiction of the Santa Fe Court. On December 18, 1976, Detroit in fact did bring an action in Michigan state court against GAC alone. However, on March 16, 1977, the court dismissed the action on GAC's motion, on the ground that UNC was a necessary party to the action whom GAC could not join because of the

* Judge Frankel's opinion dismissing the I&M federal court action is annexed hereto as Appendix E.

Injunction and dismissal was necessary to avoid prejudice to GAC from possible inconsistent adjudications. Detroit's motion for rehearing of the motion for dismissal is *sub judice*.

Since Detroit continues to resist joinder in the Santa Fe litigation and to press its action in Michigan state court, there is no assurance that GAC will be able to avoid inconsistent adjudication in the pending proceedings or in any subsequent proceedings.

Commonwealth Litigation. The Injunction has prevented GAC from asserting claims against UNC in the pending arbitration proceeding instituted against GAC and UNC by Commonwealth and ordered by the Illinois federal court pursuant to the Federal Arbitration Act.

The Commonwealth utility contract (to which UNC and GAC are parties) and the 1973 Uranium Supply Agreement between UNC and GAC both contain arbitration clauses requiring UNC to arbitrate disputes arising thereunder. Pursuant to these provisions, GAC contends that it is entitled to compel UNC to arbitrate disputes relating to price, quantity and other terms and conditions for uranium required under the Commonwealth utility contract.*

* The arbitration clause in the Commonwealth contract provides:

> "Any dispute arising from this Contract, including any failure to agree upon any matter where this Contract provides for future agreement of the parties, shall be submitted to arbitration on request of either party. One arbitrator shall be appointed by agreement of the parties or, in default of agreement, in accordance with the rules of the American Arbitration Association, which rules also shall govern the arbitration proceedings. The costs of any arbitration proceeding shall be borne equally by UNC and Purchaser unless the arbitrators find one of the parties' position in the dispute was not taken in good faith, in which case, such costs shall be assessed against that party except that each party shall be responsible for its own costs of preparing for such arbitration."

Commonwealth has demanded arbitration against GAC, Gulf and UNC of disputes arising under the Commonwealth contract. GAC, Gulf and UNC opposed this demand, but were ordered to submit to arbitration by the Illinois federal courts, pursuant to Section 4 of the Federal Arbitration Act. *Commonwealth Edison Co.* v. *Gulf Oil Corp.*, 400 F. Supp. 888 (N.D. Ill. 1975), *aff'd*, 541 F.2d 1263 (7th Cir. 1976).

The Commonwealth arbitration currently is proceeding even though the Injunction prevents GAC from asserting claims against its co-defendant, UNC, therein.

Duke Litigation. Duke also has demanded arbitration against GAC (but not against UNC) of disputes arbitrable under the Duke contract.* GAC opposed this demand on

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The arbitration provision in the 1973 Uranium Supply Agreement provides:

> "In the event that any disputes, which may arise between the parties during the course of this Agreement, cannot be mutually resolved, either party may elect to submit such disputes to arbitration in accordance with the Rules of the American Arbitration Association. Upon notice of such election, each party shall designate one member of the arbitration panel and the designees shall choose an impartial third member who shall chair the panel.
>
> "The panel shall hear and consider the position of each party and shall equitably resolve the dispute by a determination based on the terms and conditions of this Agreement. Such determination shall be final and binding on both parties and judgment upon the award rendered by the Arbitrators may be entered in any Court having jurisdiction thereof."

* The arbitration clause in the Duke contract provides:

> "Any dispute arising from the contract shall be submitted to arbitration on request of either party. One arbitrator shall be appointed by each of the parties and a third arbitrator shall be appointed by agreement of the parties or, in default of agreement, in accordance with the rules of the American Arbitration Association, which rules also shall govern the arbitration proceedings. The costs of any arbitration proceeding shall be borne equally by Gulf United and Purchaser unless the arbitrators rule against one of the parties, in which case, such costs shall be assessed against that party."

the ground that UNC was a necessary party to any such arbitration proceeding, but was required to submit to arbitration, despite the absence of UNC, by order of a North Carolina federal court. *General Atomic Co.* v. *Duke Power Co.*, 420 F. Supp. 215 (W.D.N.C. 1976).

Neither Commonwealth nor Duke is a party to the Santa Fe litigation and neither can feasibly be joined therein because of the binding arbitration provisions contained in the respective Commonwealth and Duke utility contracts. In its answer to UNC's complaint in the Santa Fe action, filed on May 5, 1976, GAC demanded that UNC arbitrate issues relating to the Commonwealth and Duke contracts.*

Nevertheless, on March 25, 1977, the Santa Fe Court denied GAC's motion to dismiss or sever issues relating to the Commonwealth and Duke contracts—despite GAC's demand for arbitration, the absence of those utilities in the Santa Fe litigation and the pendency of arbitration proceedings against GAC by those utilities in separate forums.

Coupled with the Injunction, the effect of such denial has been not merely to deprive GAC of arbitration rights but also to enhance the prospect of inconsistent results in arbitration proceedings, on the one hand, and in the Santa Fe action, on the other.

Reasons for Granting the Writ

The fundamental issue of constitutional law presented by this Petition is the same as that presented by the Prior Petition: The direct conflict between the Injunction and the principles of federal supremacy explicated by this

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* Because of the Injunction, GAC could not demand arbitration against UNC other than in the Santa Fe litigation.

Court in *Donovan* (*see* Prior Petition, pp. 11-20; Prior Reply, pp. 11-13).

This Court granted the Prior Petition and, without more, vacated the judgment of the New Mexico Supreme Court, remanding only "to consider whether the judgment is based upon federal or state grounds, or both".

This Court's grant of certiorari on the Prior Petition reflects the importance of the federal question presented. Since the New Mexico Supreme Court now has expressly held that it left the Injunction in effect because it deemed *Donovan* inapposite, the issue of federal supremacy previously judged worthy of review on writ of certiorari should now be decided on the merits. On the merits, the judgment of the New Mexico Supreme Court is plainly contrary to the constitutional principles of federal supremacy enunciated in *Donovan* and should be summarily reversed.

The order and opinion of the New Mexico Supreme Court on remand has conclusively refuted UNC's argument that the judgment might not have been based on federal grounds (*see* UNC's Brief in Opposition (the "Prior Opposition"), pp. 3-5; Prior Reply, pp. 2-5). That court expressly decided the precise federal question presented by the Prior Petition. It held that "[t]he issue considered in Donovan is not present in the instant case and the rationale for that decision is inapplicable to the facts before the [Santa Fe Court]", that "the [Santa Fe Court] did not run afoul of the dictates of Donovan", that "the injunction here is not contrary to the Donovan holding" and, finally, that "the [Santa Fe Court] could properly issue such an injunction to include all forums whether state or federal"

(Appendix D, pp. 8-10).* In short, the New Mexico Supreme Court squarely held that a state court constitutionally may enjoin a party from seeking access to federal proceedings, contrary to the clear mandate of *Donovan*.

1. ***The Injunction Unconstitutionally Inhibits Petitioner's Access To And Rights In Federal Courts.*** The Injunction has denied and continues to deny the constitutional rights of GAC and its constituent partners both to institute proceedings in federal courts and to defend themselves in on-going proceedings instituted by third parties. The Injunction, moreover, poses a substantial threat to constitutional rights of other prospective litigants. Until this Court acts, the Injunction will remain in effect and the New Mexico courts, at least, will persist in limiting the mandate of *Donovan*.

No lengthy discussion is necessary to demonstrate the fallacies of the New Mexico Supreme Court's attempt to distinguish *Donovan*.**

A. The New Mexico Supreme Court attempts to restrict *Donovan* to proceedings where federal jurisdiction had attached prior to issuance of the state court injunction (Appendix D, pp. 8-10). This restriction is both contrary

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* The court's statement that "[a]s a matter of state law, we hold that, under these circumstances, a district court has inherent equity power to order such a restraint" (Appendix D, p. 7) merely summarizes that court's conclusion that *Donovan* is not applicable to the circumstances of this case and thus does not restrict the power, otherwise said to be vested by state law in the Santa Fe Court, to issue the Injunction. In other words, the court held that (1) under state law, state courts have inherent equity power to prevent allegedly vexatious or oppressive litigation and (2) *Donovan* does not restrain the particular exercise of that power by the Santa Fe Court in the circumstances of this case.

** The parties dealt extensively with *Donovan* in connection with the Prior Petition (Prior Petition, pp. 11-20; Prior Opposition, pp. 18-28; Prior Reply, pp. 11-12). The New Mexico Supreme Court essentially adopted the position taken by UNC (*compare* Appendix D, pp. 6-10, *with* Prior Opposition, pp. 17-28).

to the rationale of *Donovan* and flatly inconsistent with its holding. *Donovan* involved two different federal actions, one instituted *prior* to and one instituted *after* issuance of the injunction. The injunction prohibited both further prosecution of the pending federal action and institution of any new action. Contempt citations were issued by virtue of both further prosecution (by appeal) of the pending action and the filing of a *new* federal action. *City of Dallas* v. *Brown*, 368 S.W.2d 240 (Tex. Ct. App. 1963). Twenty-six of the original federal court plaintiffs, including Donovan, were cited for contempt *solely for instituting a new federal action after the state court injunction had been issued.* This Court reversed *all* of the contempt citations, those based on initiation of a new federal action as well as those based on further proceedings in a pending federal action (*see* Prior Petition, pp. 17-20; Prior Reply, p. 12).

B. The New Mexico Supreme Court also opined that because two federal actions were exempted from the Injunction, "any further federal action would be based on the same issues and events for the purpose of harassment" (Appendix D, pp. 6-7). This speculation completely ignores the fact that the interpleader action was dismissed *prior* to issuance of the Injunction and the very narrow Gulf declaratory judgment action was dismissed almost five months prior to the court's opinion on remand (*see* p. 8, *supra*).* But more importantly, it defines as "harassment" the efforts of GAC, an unwilling defendant, adequately to defend itself by impleading UNC, both in federal court and in arbitration ordered by federal courts pursuant to federal law (*see* pp. 11-15, *supra*).*

* The court recognizes that the only threatened "harassment" was the possibility that "GAC would try to bring UNC into the I & M suit and the Duke arbitration case and any other suit involving the utilities" (Appendix D, pp. 4-5). Thus the Injunction immunizes UNC, GAC's supplier, from involvement in litigation brought against GAC by the utilities, GAC's customers, notwithstanding that it is *UNC* that originally entered into each of the contracts involved in such litigation as part of a multi-million dollar enterprise (*see* Prior Reply, pp. 5-9).

To suggest that such impleader of UNC would constitute "harassment" simply manifests a determination to confine GAC's disputes with UNC to the New Mexico state courts, regardless of the violence done to the Supremacy Clause.**

In any event, the views of state courts about the propriety of recourse to the federal courts are totally irrelevant. Under the Supremacy Clause, state courts are

* The Court of Appeals for the Tenth Circuit, in contrast, stated that it was not "blind to the serious problem created by the posture adopted by United Nuclear". *General Atomic Co.* v. *Duke Power Co., et al.*, — F.2d — (10th Cir. No. 76-1152, filed April 8, 1976).

** We believe it fair to say that the New Mexico Supreme Court has not yet manifested an understanding of how the Injunction has prejudiced GAC's constitutional rights. That court's prior judgment leaving the Injunction in effect was rendered immediately after oral argument. On remand from this Court, the New Mexico Supreme Court declined GAC's suggestion that the issues be further briefed and argued, although only one of the four justices who rendered the opinion on remand had sat on the prior panel. That court thus did not have the benefit of the parties' views concerning either this Court's disposition of the Prior Petition or the continuing effect of the Injunction on GAC in proceedings outside New Mexico. Perhaps that is the reason why the New Mexico Supreme Court made the surprising statement that GAC could "raise any issue that is being litigated in the state court" in the interpleader action and the Gulf declaratory judgment action (Appendix D, p. 9)—which, contrary to the court's statement (Appendix D, p. 4), did not raise "the same issue" as the interpleader action.

The New Mexico Supreme Court evidences great concern about the "interest of comity" when it considers state court injunctions which would proscribe "instituting . . . another action in the same state or in a sister state" because that would "interfere with the exercise of jurisdiction of the neighboring court" (Appendix D, p. 6). In contrast, it blandly asserts, without discussion, that the Injunction here, to the extent it enjoins instituting *federal* proceedings, "does not offend any interest of comity" (Appendix D, p. 9).

utterly without power to deny access to federal proceedings or to curtail the nature or number of claims that a party may seek to assert in such proceedings (see *Donovan*; *see* Prior Petition, pp. 11-20; Prior Reply, pp. 11-12). Such determinations are left to the federal courts, which are well equipped to prevent unfair harassment.*

C. The New Mexico Supreme Court also ignored the fact that federal jurisdiction had already attached as to GAC in the action brought by I & M against GAC in New York, before the Injunction was issued. It simply ignored the great prejudice imposed by the Injunction in eliminating GAC's federal right to implead UNC in the New York action and to bind UNC to the result of the I & M—GAC—UNC contract controversy in that forum.

2. *The Injunction Unconstitutionally Deprives Petitioner Of Its Federal Rights To Arbitration Of Disputes.* The effect of the Injunction has not been limited to federal court litigation. As recent developments have made clear, it also prevents GAC from defending itself in federal arbitration proceedings instituted by a utility against GAC, denies to GAC its substantive federal right to enforce agreements to arbitrate and again subjects GAC to the risk of inconsistent adjudications in separate proceedings.

In the Commonwealth arbitration proceeding, for example, Commonwealth seeks to compel specific performance by GAC (and UNC) of a utility contract originally made with UNC, while in the Santa Fe litigation against

* It is impossible to enumerate in advance all possible occasions in which GAC or its constituent partners may need to exercise their rights to assert claims in federal proceedings. To date, federal proceedings brought by utilities are the only proceedings outside New Mexico in which GAC has expressed an intention to assert claims against UNC (*see* Prior Reply, pp. 5-9). Under *Donovan*, in any case, a state court may not preclude the exercise of those rights for any reason.

GAC alone, UNC seeks to avoid performance of its obligation to supply to GAC the uranium required by GAC for performance of the utility contract. It is GAC's (and UNC's) position that the Commonwealth contract has been terminated. But if the arbitrators find that contract to be enforceable, and also find that GAC is required to supply the uranium thereunder at the contract price, it is imperative that this determination against GAC also be binding on UNC. This is because UNC contends in the Santa Fe Court that UNC's obligations under the 1973 Uranium Supply Agreement are contingent upon GAC's obligations to the utility involved and UNC also contends in the Santa Fe Court that GAC is not obligated to perform the utility contracts.*

The Federal Arbitration Act makes the arbitration provisions in the utility contracts and in the 1973 Uranium Supply Agreement "valid, irrevocable, and enforceable" as a matter of substantive federal law. 9 U.S.C. § 2. Indeed, the Illinois federal courts have already specifically found that the Commonwealth contract is governed by the Federal Arbitration Act and have ordered GAC, Gulf and UNC to arbitrate with Commonwealth pursuant to Section 4 of the Act. 541 F.2d 1263 (7th Cir. 1976). However, although GAC, Gulf and UNC are all parties to the arbitration pursuant to federal court order, and although GAC has demanded that UNC arbitrate its disputes with GAC regarding GAC's obligations under the Commonwealth contract,

* GAC cannot avoid the risk of inconsistent adjudication by protective measures in the Santa Fe Court. Commonwealth and Duke cannot be made parties to that litigation because of their arbitration rights. Yet the Santa Fe Court has recently denied GAC's motion to dismiss or sever the Commonwealth and Duke contract issues from that litigation, notwithstanding the absence of those utilities from the action, the pendency of the arbitration proceedings raising those issues in other forums and GAC's demand for arbitration of those contract disputes (*see* pp. 13-15, *supra*).

UNC has thus far avoided such arbitration by reason of the Injunction, since GAC is prevented from demanding arbitration in the proceeding itself or from requesting the federal court to compel such arbitration.*

The effect of all of this is that GAC cannot so much as approach a federal court to seek vindication of its federal arbitration rights. The effect, furthermore, is to prevent GAC from obtaining a unitary, consistent determination of its rights and obligations under the Commonwealth contract, binding on all of the parties concerned, including UNC. GAC may therefore face the ultimate absurdity in which the arbitrators may find that GAC is obligated to deliver to Commonweath at contract prices, while the Santa Fe Court might hold, on the contrary, that GAC is not so obligated, and on that very ground excuse UNC from performance to GAC. This unconscionable risk has already led both the I&M federal court and the Detroit Edison state court to dismiss those utility claims in favor of the lesser prejudice of relegating all parties to the Santa Fe Court. However, even that result is not available in the case of utilities entitled to arbitration.

It bears emphasis that the rights created by the Federal Arbitration Act are not merely procedural, but are rights of a substantive nature. *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404-06 (1967); *Commonwealth Edison Co.* v. *Gulf Oil Corp.*, 541 F.2d 1263 (7th

* The federal court would have subject matter jurisdiction of such a proceeding. Under the Act, such jurisdiction exists if the court, save for the arbitration agreement, would have jurisdiction of the subject matter of a suit arising out of the parties' controversy. While there is not diversity of citizenship between GAC and UNC, the court in an impleader context would have ancillary jurisdiction. *See, e.g., Stemler* v. *Burke*, 344 F.2d 393 (6th Cir. 1965); *Agrashell, Inc.* v. *Bernard Sirotta Co.*, 344 F.2d 583 (2d Cir. 1965). *See also* Prior Petition, pp. 14-15. *See also* footnote, p. 23, *infra*.

Cir. 1976). The Act manifests a Congressional policy of facilitating arbitration whenever possible and, under the Supremacy Clause, state law may not be used to curtail or limit rights under the Federal Arbitration Act.* *Prima Paint*, 388 U.S. 395, 405-06. For example, in *Grand Bahama Petroleum Co.* v. *Asiatic Petroleum Corp.*, 550 F.2d 1320 (2d Cir. 1977), the Court of Appeals for the Second Circuit recently held that a foreign corporation's right to institute a federal action to compel arbitration could not be defeated by a state statute requiring payment of state fees and taxes as a condition to bringing suit. The court held that the state law could not be applied so as "to frustrate the petitioner's access to a federal forum to litigate an admittedly federal matter and thereby limit the uniform and effective application of a federal statute. . . ." 550 F.2d at 1326.

But this is just what the Santa Fe Court is attempting to do. The Injunction purports to arrogate to the Santa Fe Court itself the sole power to determine disputes whose arbitrability is guaranteed by federal law. The Santa Fe Court has no such power, as indeed the Court of Appeals for the Seventh Circuit made clear in the *Commonwealth Edison* action in refusing to apply state law "which shifts the determination of disputes from arbitrators to courts", 541 F.2d at 1269, or which requires dismissal of an action

* Even where there is no federal jurisdiction, there is a growing body of state court authority recognizing that, since the rights created by the Federal Arbitration Act are substantive federal rights, the Supremacy Clause requires state courts to enforce those rights in state court actions regardless of inconsistent state law. *See, e.g., Litton RCS, Inc.* v. *Pennsylvania Turnpike Comm'n*, 376 F.Supp. 579, 591 n.21 (E.D. Pa. 1974), *aff'd*, 511 F.2d 1394 (3d Cir. 1975); *Pathman Constr. Co.* v. *Knox County Hosp. Ass'n*, 326 N.E.2d 844 (Ind. Ct. App. 1975); *Rederi* v. *Dow Chem. Co.*, 25 N.Y. 2d 576, 307 N.Y.S. 2d 660, 255 N.E.2d 774, *cert. denied*, 398 U.S. 939 (1970); *Aerojet —General Corp.* v. *Non-Ferrous Metal Ref. Ltd.*, 37 App. Div. 2d 531, 322 N.Y.S.2d 33 (1971); *Miller* v. *Puritan Fashions Corp.*, 516 S.W. 2d 234 (Tex. Ct. App. 1974).

when "there is another action pending between the same parties for the same cause", 541 F.2d at 1271. Thus, even apart from *Donovan*, recent precedents make it clear that the Injunction is plainly unconstitutional under the Supremacy Clause.

Donovan requires the same conclusion. There can be no doubt about the application of *Donovan* under these circumstances. *Donovan* prohibits state courts from enjoining access to federal proceedings of any sort. The Injunction here prevents GAC and its constituent partners from asserting claims provided for by federal law in an on-going arbitration proceeding ordered by federal courts and prevents GAC and its constituent partners from vindicating those rights in federal court, in clear contravention of a federal statute specifically providing for such an action in federal court.

Conclusion

This Court granted the Prior Petition, vacated the New Mexico Supreme Court judgment and remanded the cause only to ascertain whether or not the federal constitutional issue had been reached by the New Mexico courts. The New Mexico Supreme Court has now confirmed that it based its judgment on federal grounds, but chose to adopt the erroneous reading of *Donovan* devised by UNC.

There is no necessity here for full briefing. The outrage to federal supremacy is patent. For more than a year, the ever-widening circles of disruption caused by the Injunction have become increasingly evident. The Injunction has unconstitutionally hindered GAC's ability to defend itself in on-going litigation instituted by third parties, impeded access to federal courts and denied rights created by Act of Congress. The Injunction and its approval by the New

Mexico Supreme Court reflect an impermissably restrictive attitude toward the fundamental rights protected by the Supremacy Clause. For this reason, and for the other reasons stated above and in the Prior Petition and Prior Reply, GAC's Petition should be granted and the order of the New Mexico Supreme Court summarily reversed.

Respectfully submitted,

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May 23, 1977

APPENDIX A

Preliminary Injunction

IN THE DISTRICT COURT
OF THE FIRST JUDICIAL DISTRICT

STATE OF NEW MEXICO, COUNTY OF SANTA FE

No. 50827

UNITED NUCLEAR CORPORATION,
a Delaware corporation,

Plaintiff,

v.

GENERAL ATOMIC COMPANY, a partnership composed of
GULF OIL CORPORATION and SCALLOP NUCLEAR, INC.

Defendants.

The above entitled cause having come on before the Court on plaintiff's application for a preliminary injunction prohibiting General Atomic Company or its partners, privies, agents, servants and employees from instituting or prosecuting any action or actions in any other forum, and notice having been given as provided by law, and the Court having considered all pleadings, affidavits, documentary evidence, briefs and argument of counsel, FINDS:

1. This Court's jurisdiction over the parties and subject matter of this action attached prior to the institution of any proceedings in any other forum involving the subject matter of this action.

2. In the interest of orderly procedure, the parties to this suit should have their rights, duties and liabilities determined by this Court.

3. A determination of this lawsuit may fully resolve the disputes between the parties, thus obviating any need for further litigation concerning the subject matter of this suit.

4. Plaintiff will be irreparably injured should the injunction prayed for not be granted in that defendant has admitted that unless restrained it will seek to file additional actions against plaintiff and plaintiff will have no adequate remedy at law in that the harm sought to be avoided by this injunction will have occurred.

5. The institution or prosecution of other legal proceedings by any of the parties to this action, or their privies, would be vexatious and harassing and would be multiplicitous litigation, all of which is contrary to the speedy and orderly administration of justice.

6. The inconvenience, amount of litigation, and expense which would be suffered by the parties if other proceedings are instituted or prosecuted will be reduced or eliminated if a preliminary injunction is granted.

7. There is currently pending in the United States District Court for the District of New Mexico a case entitled Gulf Oil Corporation v. United Nuclear Corporation, Civil No. 76-032-B. There is also currently pending before the United States Court of Appeals for the Tenth Circuit an appeal entitled General Atomic Co. v. Duke Power Company, et al., No. 76-1152.

8. No bond or security need be given by United Nuclear Corporation as this injunction merely maintains the status quo between the parties and this preliminary injunction will

benefit both parties in that the inconvenience and expense of multiplicitous litigation will be reduced or eliminated.

And the Court Concludes as matters of law that:

A. This Court has jurisdiction over the subject matter of this action and the parties hereto.

B. This Court has the authority to issue a preliminary injunction as requested by plaintiff and should do so, except, however, that this injunction shall not operate so as to forbid Gulf Oil Corporation from prosecuting the case entitled Gulf Oil Corporation v. United Nuclear Corporation, Civil Cause No. 76-032-B in the United States District Court for the District of New Mexico, a cause pending at the time application for this preliminary injunction was made, and the prosecution of that appeal to the Tenth Circuit Court of Appeals entitled General Atomic Co. v. Duke Power Company, et al., No. 76-1152.

It Is Therefore Ordered that General Atomic Company, its partners, privies, agents, servants and employees, are hereby preliminarily enjoined and prohibited from filing or prosecuting any other action or actions against United Nuclear Corporation in any other forum relating to any rights, claims or the subject matter of this action. This injunction prohibits the institution or prosecution of ordinary litigation, third party proceedings, cross-claims, arbitration proceedings or any other method or manner of instituting or prosecuting actions, claims or demands relating to the subject matter of this lawsuit, or including United Nuclear Corporation as a party thereto. However, the case of Gulf Oil Corporation v. United Nuclear Corporation, Civil Cause No. 76-032-B, currently pending in the United

Preliminary Injunction

States District Court for the District of New Mexico, is excepted from the operation of this preliminary injunction, as is the appeal currently pending before the Tenth Circuit Court of Appeals in General Atomic Co. v. Duke Power Company, et. al., No. 76-1152. The injunction herein against defendant shall bind Plaintiff to the same terms.

Submitted:

EDWIN L. FELTER
District Judge

HARRY L. BIGBEE
One of Pltfs. Attys.

WILLIAM FEDERICI
One of the Defendant's
Attorneys.

APPENDIX B

Opinion of Felter, *D.J.*

STATE OF NEW MEXICO

First Judicial District

March 29, 1976

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Re: United Nuclear Corp. v. General Atomic Co.
Santa Fe County #50827

Dear Sirs:

Consideration has been given to the pleadings, affidavits, testimony, briefs and arguments of counsel in the above-entitled and numbered case. Three issues are now before the Court for decision, namely:

1. Respondents' Motion to Dismiss for want of in personam jurisdiction over respondent.

2. Respondents' Motion to Dismiss for failure to join indispensable parties.

3. Plaintiff's application for a preliminary injunction.

I am of the opinion that this Court has in personam jurisdiction over respondents herein and that no defect in jurisdiction or otherwise exists by reason of any failure to join indispensable parties. Therefore, respondents motion to dismiss for lack of in personam jurisdiction and their motion to dismiss for failure to join indispensable parties are both denied.

Both parties made strong and convincing arguments of their respective positions upon plaintiff's application for a preliminary injunction. Either way the Court should rule on this issue would result in some inconvenience and expense to the losing party. I am satisfied that the Court has the authority to grant such a preliminary injunction except insofar as are concerned federal cases where the jurisdiction of the Court has already attached.

In the interest of orderly procedure, it occurs to me that the parties to this lawsuit should have their rights, duties and liabilities determined in this forum upon the merits of this case at the earliest possible date. Conceivably, such a determination could obviate in other forums, other litigation connected with the subject matter of this lawsuit. I believe that the sum total of inconvenience, litigation and expense, without analyzing which party to the greater extent may be affected thereby, can be ameliorated or reduced by the granting of the preliminary injunction. I believe that the ends of justice will be served better by the granting of the preliminary injunction than would be the case if it were refused. I am confident that once this case is decided on its merits,

irrespective of which party prevails, that any remaining rights, duties or liabilities between the parties and those of any other interested parties can be and will be settled or litigated appropriately.

Accordingly, respondents will be enjoined preliminarily, from filing or prosecuting any other action or actions against plaintiff in any other forum, relating to any of the rights, claims or subject matter of this lawsuit. The preliminary injunction shall include ordinary litigation, third party proceedings, arbitration proceedings and any and all other methods of prosecuting actions, claims, demands, etc. Jurisdiction of the District Court of the United States for the District of New Mexico already has attached in an action wherein Gulf Oil Corporation is plaintiff and United Nuclear Corporation is defendant. That case is excepted from the operation of the preliminary injunction hereby granted as required by Donovan v. City of Dallas, 377 U.S. 408, 84 S. Ct. 1579 (1964) rehearing denied 85 S. Ct. 14.

Counsel for plaintiff should submit to the Court for signature and filing an appropriate order consistent with the Court's ruling. Respondents may have twenty days from the date of entry of such order within which to plead to the merits or file such responsive pleadings as may be proper.

Very truly yours,

Edwin L. Felter
District Judge

ELF/ama

APPENDIX C

Mandate of the Supreme Court of the United States
Dated December 28, 1976

UNITED STATES OF AMERICA, ss:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

TO THE HONORABLE THE JUDGES OF THE
SUPREME COURT OF THE STATE OF NEW MEXICO,

Greetings:

WHEREAS, lately in the Supreme Court of the State of New Mexico, there came before you a cause between General Atomic Company, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc., petitioner, and Hon. Edwin L. Felter, District Court Judge for the First Judicial District, Santa Fe County, New Mexico, respondent, No. 10870, wherein the judgment of the said Supreme Court was duly entered on the sixteenth day of June A. D. 1976, as appears by an inspection of the petition for writ of certiorari to the said Supreme Court and the response thereto.

AND WHEREAS, in the 1976 Term, the said cause having been submitted to the SUPREME COURT OF THE UNITED STATES on the said petition for writ of certiorari and response thereto, and the Court having granted the said petition:

ON CONSIDERATION WHEREOF, it was ordered and adjudged on November 29, 1976, by this Court that the judgment of the Supreme Court of New Mexico in this cause be vacated, and that this cause be remanded to the Supreme Court of the State of New Mexico to consider whether the judgment is based upon federal or state grounds, or both. See California v. Krivda, 409 U.S. 33 (1972).

Mandate of the Supreme Court of the United States
Dated December 28, 1976

NOW, THEREFORE, THE CAUSE IS REMANDED to you in order that such proceedings may be had in the said cause, in conformity with the judgment of this Court above stated, as accord with right and justice, and the Constitution and laws of the United States, the said writ notwithstanding.

Witness the Honorable WARREN E. BURGER, Chief Justice of the United States, the twenty-eighth day of December in the year of our Lord one thousand nine hundred and seventy-six.

MICHAEL RODAK, JR.
Clerk of the Supreme Court
of the United States

No. 76-385

General Atomic Company,

v.

Edwin L. Felter, etc., et al.

APPENDIX D

Order and Opinion of the Supreme Court of the State of New Mexico Entered February 21, 1977

No. 10870

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

—0—

GENERAL ATOMIC COMPANY, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,

Petitioner,

vs.

THE HONORABLE EDWIN L. FELTER, District Court Judge for the First Judicial District, Santa Fe County, New Mexico,

Respondent.

—0—

PROCEEDINGS ON A WRIT OF PROHIBITION
AND RESPONSE TO MANDATE OF THE
UNITED STATES SUPREME COURT

RODEY, DICKASON, SLOAN, AKIN & ROBB

MODRALL, SPERLING, ROEHL, HARRIS & SISK
Albuquerque, New Mexico

MONTGOMERY, FEDERICI, ANDREWS, HANNAHS & BUELL
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Santa Fe, New Mexico

Attorneys for United Nuclear Corporation, a real party in interest.

Order and Opinion of the Supreme Court of the State of New Mexico Entered February 21, 1977

Opinion

McMANUS, Justice

General Atomic Company (GAC) applied to this Court for a writ of prohibition directed to the First Judicial District Court of New Mexico. That court had issued the following injunction:

> IT IS THEREFORE ORDERED that General Atomic Company, its partners, privies, agents, servants and employees, are hereby preliminarily enjoined and prohibited from filing or prosecuting any other action or actions against United Nuclear Corporation in any other forum relating to any rights, claims or the subject matter of this action. This injunction prohibits the institution or prosecution of ordinary litigation, third party proceedings, cross-claims, arbitration proceedings or any other method or manner of instituting or prosecuting actions, claims or demands relating to the subject matter of this lawsuit, or including United Nuclear Corporation as a party thereto. However, the case of Gulf Oil Corporation v. United Nuclear Corporation, Civil Cause No. 76-032-B, currently pending in the United States District Court for the District of New Mexico, is excepted from the operation of this preliminary injunction, as is the appeal currently pending before the Tenth Circuit Court of Appeals in General Atomic Co. v. Duke Power Company, et al., No. 76-1152. The injunction herein against defendant shall bind Plaintiff to the same terms.

This Court granted an alternative writ on April 19, 1976 to consider the claims raised by GAC. After briefing and

Order and Opinion of the Supreme Court of the State of New Mexico Entered February 21, 1977

oral argument from counsel for GAC and United Nuclear Corporation (UNC) we quashed this writ as being improvidently granted on June 16, 1976. GAC then appealed this order to the United States Supreme Court. The United States Supreme Court, on December 28, 1976, issued its mandate with the following quoted directions to this Court:

> ON CONSIDERATION WHEREOF, it was ordered and adjudged on November 29, 1976, by this Court that the judgment of the Supreme Court of New Mexico in this cause be vacated, and that this cause be remanded to the Supreme Court of the State of New Mexico to consider whether the judgment is based on federal or state grounds, or both. See California v. Krivda, 409 U.S. 33 (1972).

Pursuant to the mandate of that Court, we set forth below the reasons for our actions in this matter.

UNC is in the business of mining and milling uranium. Approximately ten years ago UNC started manufacturing reload fuel and assemblies for nuclear reactors. It entered into a joint corporation, Gulf United Nuclear Fuels Corporation, with Gulf Oil Corporation (Gulf) in order to obtain additional capital. Gulf purchased UNC's interest in the joint corporation in 1973 and thereby acquired contracts to supply uranium to various power companies in the country. Gulf later entered into a partnership agreement with Scallop Nuclear, Inc. (Scallop) and formed the present General Atomic Company (GAC). Gulf assigned to GAC the utility supply agreements.

From 1967 to mid-1973 the market price of uranium was relatively stable at about $7.00 per pound and the

utility supply contracts were based upon that figure. Since 1973 the market price of uranium has increased to approximately $40.00 per pound. The value of the uranium in dispute is considerable in the eyes of everyone concerned.

UNC stopped delivery of the uranium in 1975 and filed a declaratory judgment action on August 8, 1975 against GAC and its constituent partners seeking to avoid its obligation under the contract. Gulf removed the case to the United States District Court for the District of New Mexico; UNC took a voluntary non-suit and filed again in state court naming only GAC as defendant.

UNC applied for a temporary restraining order on January 19, 1976 in the District Court of Santa Fe County, New Mexico, to prevent GAC from instituting any additional suits against UNC. This motion was denied. GAC filed a statutory interpleader in the United States District Court for the District of New Mexico on the same day naming UNC and four utility companies as defendants. On January 20, 1976 Gulf filed a suit in the same federal court against UNC on the same issue. (This suit was subsequently dismissed on a motion by UNC; the court declined to take jurisdiction because the issues could all be resolved in the state court proceeding.) Indiana & Michigan Electric Company (I & M) (one of the utility companies) filed suit in the United States District Court for the Southern District of New York against GAC and its partners on February 24, 1976. Duke Power Company (another utility) filed a demand on February 17, 1976 for arbitration proceedings against GAC on another uranium supply contract. On March 15, 1976 UNC again applied for a temporary restraining order and a preliminary injunction in the District Court of Santa Fe County, New Mexico after learning that GAC would try to bring UNC into the I & M suit and the Duke arbitration case and any other suit involving the utilities. After a hearing, the District Court granted the preliminary injunction restraining GAC, its partners, privies, agents, servants and employees from instituting any further legal action against UNC. The injunction was also applied to UNC. The District Court specifically excepted the federal action already proceeding[1] and the federal suit on appeal to the United States Court of Appeals for the Tenth Circuit.[2]

New Mexico Const. art. 6, § 3 grants to this Supreme Court the power to issue writs of mandamus, error, prohibition, habeas corpus and "all other writs necessary or proper for the complete exercise of its jurisdiction . . ." Prohibition is an extraordinary remedy which is granted only in limited circumstances at the discretion of the Court and is properly invoked to prevent an inferior court from acting either without jurisdiction or in excess of its jurisdition. State ex rel. Harvey v. Medler, District Judge, 19 N.M. 252, 142 P.376 (1914); Cal-M, Inc. v. McManus, 73 N.M. 91, 385 P.2d 954 (1963); State v. Tackett, 68 N.M. 318, 361 P.2d 724 (1961); State v. Carmody, 53 N.M. 367, 208 P.2d 1073 (1949). This writ should be issued sparingly and only where irreparable harm, extraordinary hardship, costly delays, or unusual burdens of expense would result. State v. Scarborough, 75 N.M. 702, 410 P.2d 732 (1966); Montoya v. McManus, 68 N.M. 381, 362 P.2d 771 (1961).

---

[1] Gulf Oil Corporation v. United Nuclear Corporation (D.N.M. No. 76-032-B)

[2] General Atomic Company v. Duke Power Company, et al., (D.N.M. No. 76-029-B); (10th Cir. No. 76-1152).

Prohibition, however, is not a substitute for an appeal nor can it be used merely to correct an erroneous decision of the district court. Baca v. Burks, 81 N.M. 376, 467 P.2d 392 (1970); State v. Coors, 52 N.M. 189, 194 P.2d 678 (1948). Therefore, in order to determine whether a writ of prohibition is appropriate, we must consider whether issuing the injunction was within the jurisdiction of the district court.

It is well settled that once a court has acquired jurisdiction over the parties and the subject matter, it may enjoin either party from instituting or proceeding with another action in the same state or in a sister state based upon the same facts and issues. Cole v. Cunningham, 133 U.S. 107 (1890). This principle rests upon the court's inherent equity power to prevent injustice. Baltimore & Ohio R. Co. v. Kepner, 314 U.S. 44 (1941). Most courts are reluctant to resort to such measures in the interest of comity, because even though the injunction acts in personam it operates to interfere with the exercise of jurisdiction of the neighboring court. James v. Grand Trunk Western Railroad Company, 14 Ill.2d 356, 152 N.E.2d 858, cert. denied, 358 U.S. 915 (1958). For that reason an injunction will not issue to prevent mere inconvenience or hardship, but rather is to be used when serious and grave reasons are present. Southern Pac. Co. v. Baum, 39 N.M. 22, 38 P.2d 1106 (1934). The prevention of vexatious, harassing and oppressive suits has been generally recognized as an appropriate basis for invoking this remedy. Allstate Insurance Company v. Hill, 218 Ga. 430, 128 S.E.2d 321 (1962); Boston & M.R.R. v. Whitehead, 307 Mass. 106, 29 N.E.2d 916 (1940); Poole v. Mississippi Publishers Corporation, 208 Miss. 364, 44 So.2d 467 (1950); John Hancock Mut. Life Ins. Co. v. Fiorilla, 83 N.J. Super. 151, 199 A.2d 65 (1964).

As the injunction applies to the institution of suits in other state courts, it was clearly within the power of the district court to restrain the parties from so acting. The Court found that further litigation was contemplated by GAC, irreparable injury would occur, there was no adequate remedy at law, further proceedings would be vexatious, harassing and multiplicitous, and that the inconvenience and expense of further proceedings would be reduced by granting the preliminary injunction. These findings give ample support for the court's order.

The thrust of GAC's challenge however, goes mainly to that portion of the injunction which restrains it from instituting further suits in federal court. GAC relies on Donovan v. City of Dallas, 377 U.S. 408 (1964) for the proposition that a state court is absolutely prohibited from interfering with the right of a party to bring multiple actions designed to harass and oppress its opponent so long as the party resorts to the federal forum. As a matter of state law, we hold that, under these circumstances, a district court has inherent equity powers to order such a restraint. We do not think that Donovan is applicable where a party is currently proceeding in federal court and where any further federal action would be based upon the same issues and events for the purpose of harassment. We do not believe that Donovan removes all equity powers from the jurisdiction of state courts whenever a party resorts to a federal forum.

In Donovan v. Dallas the plaintiffs had instituted a state court proceeding challenging the issuance and selling of municipal bonds for the expansion of a municipal airport. The case was tried and judgment was rendered for the city and upheld on appeal. The plaintiffs then filed an action

in federal court seeking the same relief. The city then obtained an injunction prohibiting the plaintiffs from continuing with the federal court action. Donovan and other plaintiffs appealed the dismissal of the federal suit and were convicted of contempt for violating the injunction. Upon review the United States Supreme Court stated the issue as follows:

> The question presented here is whether a state court can validly enjoin a person from prosecuting an action *in personam* in a district or appellate court of the United States which has jurisdiction both of the parties and of the subject matter.
> Supra at 408.

The Court then proceeded to answer this question in the negative. The bases for the decision were (1) the historical rule that state and federal courts would not interfere or try to restrain each other's proceedings, (2) that the petitioners had a right to bring such a suit in federal court and have that court decide the propriety of the state court's judgment and (3) that once jurisdiction has attached no other court may interfere with its exercise even though an in personam order was directed against the party.

The issue considered in Donovan is not present in the instant case and the rationale for that decision is inapplicable to the facts before the district court. The injunction which was issued does not directly or indirectly affect any proceeding in the district court or appellate courts of the United States where jurisdiction has attached. Those suits which were pending in federal court were exempted from the terms of the injunction. The injunction is directed only

towards the institution of future litigation wherein no federal or state court has yet to acquire jurisdiction.

GAC contends that this is a distinction without a difference but when the rationale behind the decision is applied to these facts we find that the district court did not run afoul of the dictates of Donovan. The injunction does not offend any interest of comity; the parties are not restrained from proceeding with the suits wherein the foreign court has exercised its jurisdiction. The district court carefully defined the parameters of the injunction to avoid such a conflict.

Donovan was also concerned with denying the petitioners access to the federal forum. Here no such right is being infringed. GAC has its case before two United States Courts —one district court and one appellate. GAC can raise any issue that is being litigated in the state court, and the federal court may hear all the questions on the merits; it is not limited to first considering whether the state decision is valid and the application of res judicata because no judgment has yet been rendered in the New Mexico district court. This right the Donovan Court tried to protect and the injunction here is not contrary to the Donovan holding.

The underlying issue before us is whether the district court may restrict the future acts of a party who is bringing vexatious and oppressive litigation in multiple jurisdictions for the purpose of harassment. Clearly, the party may be restrained from instituting future state actions; University of Texas v. Morris, 162 Tex. 60, 344 S.W.2d 426 (1961), and (before Donovan) some courts have held that the prohibition could encompass the federal courts too. Baltimore & Ohio R. Co. v. Kepner, supra; Wheeler v.

Order and Opinion of the Supreme Court of the State of New Mexico Entered February 21, 1977

Vimalert Co., 235 App. Div. 643, 255 N.Y.S. 114 (S. Ct. 1932); Poole v. Mississippi Publishers Corporation, supra. We feel that, in these circumstances where the considerations in Donovan are accomodated, the district court could properly issue such an injunction to include all forums whether state or federal.

Since we hold that the district court was acting within its jurisdiction in granting the injunction, this is not a proper case for the invocation of the remedy of prohibition, therefore, we will quash this writ as being improvidently granted.

IT IS SO ORDERED.

JOHN B. MCMANUS, JR., Justice

WE CONCUR:
DAN SOSA, JR., Justice
MACK EASLEY, Justice
H. VERN PAYNE, Justice

APPENDIX E

Opinion of Frankel, *J.* Dated January 5, 1977

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

76 Civ. 881

———o———

INDIANA & MICHIGAN ELECTRIC CO.,

Plaintiff,

against

GULF OIL CORPORATION, et al.,

Defendants.

———o———

Appearances:

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FRANKEL, D.J.

The court has before it two motions, one by the plaintiff seeking to amend its complaint by adding an antitrust claim, and a second by defendant essentially renewing its earlier Rule 19 motion which was denied on September 9, 1976. The court finds defendant's renewed Rule 19 motion to be compelling in light of events occurring subsequent to

the September 9th decision and is now persuaded that the complaint should be dismissed.

The instant suit between Indiana & Michigan Electric Company ("I & M") and General Atomic Corporation ("GAC") is one of three overlapping and interrelated actions involving these two parties and one other, United Nuclear Corporation ("UNC"). All arise from a connected sequence of contracts beginning with a 1967 uranium (crude and fabricated) supply contract between UNC and I & M, a contract which was subsequently assigned to a UNC-Gulf joint venture formed in 1971, then taken over by Gulf (GAC) when the joint venture was dissolved in 1973. In 1971, and again in 1973, prior to the dissolution of the joint venture, UNC and GAC negotiated uranium supply agreements designed, at least in part, to assist GAC in meeting its obligations under the assigned 1967 UNC-I & M contract, an obligation for which UNC was and is still jointly and severally liable. The other two actions, both brought by UNC, are pending in federal and state courts in New Mexico. The three actions do not raise precisely the same issues; nevertheless, in the instant action and *UNC* v. *I & M*, No. 75-561 (D.N.M.), the legal questions are very closely related, and the third, *UNC* v. *GAC*, No. SF-50827 (Dist. Ct. N.M.), will implicate many of the factual questions involved in the prior two.

GAC, both in September and now, has urged a dismissal of this action arguing that UNC is an indispensable party which cannot be joined because of an injunction of the New Mexico court precluding such joinder. This argument was rejected by the court in September, because it found UNC not to be technically indispensable and, more importantly, because this defendant, in spite of its suggestion that unitary adjudication could take place in one or more forums

in New Mexico, had not only taken no steps to bring about such a unitary action, but was at that very time challenging the assertion of jurisdiction over it in New Mexico.

Subsequent to the court's initial determination, there have been significant changes which have called into question the wisdom of the September order. First, GAC's amenability to the jurisdiction of the New Mexico state courts has been authoritatively determined, thus removing what this court had perceived as a serious obstacle to the possibility of a single lawsuit in New Mexico. Second, GAC has made two serious attempts to forge one lawsuit where all three of the interested parties could litigate their respective claims. On September 9, 1976, GAC sought to intervene in the action between UNC and I & M pending in the Federal District Court in Albuquerque. The effort failed, apparently because the action in which GAC hoped to intervene had been voluntarily stayed by agreement of UNC and I & M, and neither would act to dissolve the stay. Consequently, on December 8, GAC filed a motion with the New Mexico state court in Santa Fe where the UNC-GAC action is pending, to join as third-party defendants I & M and another utility company with related claims. No formal action has been taken by the state court on this motion, though in the course of argument before this court, I & M indicated its unwillingness to take an affirmative posture with regard to GAC's effort because it prefers this forum over one in New Mexico. Finally, though this is of only limited relevance to these proceedings, the judgment of the New Mexico Supreme Court upholding the injunction precluding GAC from suing UNC in any other forum was vacated by the United States Supreme Court and remanded to the New Mexico Supreme Court for clarification, pre-

serving the possibility that the injunction will ultimately be held invalid.[1]

There is no question about UNC's interest and involvement in the underlying dispute which forms the basis of this lawsuit. The legal issues raised in the UNC-I & M litigation in New Mexico appear substantially similar, if not identical, to those in this action. Indeed, counsel for UNC in its suit against I & M in Albuquerque Federal Court makes this point explicitly in a letter responding to GAC's motion to intervene in that action:

> "GAC and I & M are already engaged in litigation with each other in the Southern District of New York, No. 76 Civ. 881 (MEF). This lawsuit involves the same dispute that is the subject of GAC's attempted intervention here."

Further, counsel for I & M acknowledge, if somewhat begrudgingly and qualifiedly, that there are significant common questions of fact involved in this action and in *UNC* v. *GAC*, even if the legal issues are to some degree distinct.

In light of the criteria adumbrated in Rule 19(a), it seems abundantly clear that UNC is a party that should be joined if feasible. The more difficult question, and the

[1] The execution on October 20, 1976, of a document cataloguing agreement between UNC and I & M under which their respective discovery against GAC is made available to the other party has been cited by GAC as another factor which the court should consider in disposing of this motion. Specifically, GAC argues that such an arrangement bespeaks a "sweetheart agreement" between UNC and I & M, further evidenced by the stay of the action between them pending in Albuquerque, whose object is to force GAC to litigate in a forum where joinder of UNC is not possible. The court has found it unnecessary to sort out the various accusations relating to the UNC-I & M agreement; however, the agreement does underscore the substantial factual overlap between UNC's and I & M's suits against GAC.

one at issue between the parties, is whether UNC is an indispensable party in whose absence this action should not continue. Rule 19(b) outlines factors to be considered in resolving this question; however, the weight of these factors, along with others, must be determined on a case by case basis. See 7 Wright & Miller, Federal Practice and Procedure § 1608 at 66, 81-82. See also *McKenna* v. *Udall*, 418 F.2d 1171 (D.C. Cir. 1969); *Broussard* v. *Columbia Gulf Transmission Co.*, 398 F.2d 885 (5th Cir. 1968); *Holicky* v. *Selective Service Local Board No. 3, Denver, Colorado*, 328 F. Supp. 1373 (D. Colo. 1971); *Jones Knitting Corp.* v. *A.M. Pullen & Co.*, 50 F.R.D. 311 (S.D.N.Y. 1970).

In the context of the present action, the court now finds vitally important the last of the factors specified in Rule 19(b), the availability of an adequate remedy for plaintiff if the action is dismissed. The focus of this last factor is on the availability of an alternate forum in which all interested parties can be found and joined—a consideration which Professor Moore finds "clearly relevant and important in applying the 'equity and good conscience' mandate" of Rule 19(b). 3A Moore, Federal Practice 2263 & n.6. Several courts have found the availability of another forum not merely relevant and important, but actually dispositive of the question of indispensability. Judge McGowan, after pointing out that consideration of the first three factors would not warrant a dismissal under Rule 19(b), nevertheless concluded that:

> "Since appellant [plaintiff] has available another those possessed by the District Court, and in which forum with remedial powers equally as efficacious as all persons having an interest in the outcome of the

> litigation can be joined, the judgment dismissing the complaint is affirmed."

McKenna v. *Udall, supra,* at 1177. The district court in *Holicky* v. *Selective Service Local Board No. 3, Denver, Colorado, supra,* reached a similar conclusion. 328 F. Supp. at 1377. The facts of this case supply an even more compelling argument for dismissal because of the availability of alternate forums.

Specifically, despite plaintiff's cheerfully resigned view that this is "simply one of those disputes which must, unfortunately, be tried piecemeal", the court discerns that there are two forums in New Mexico, one state and one federal, where all of the parties can participate in a single litigation. In contrast to the situations in *McKenna* and *Holicky,* the forums in New Mexico are not merely available, but actions are already pending among all three parties raising related, if not identical, matters. GAC's efforts to constitute a single lawsuit by impleading I & M in the state court action (*UNC* v. *GAC*) or by intervening itself in the federal court suit (*UNC* v. *I & M*) have been resisted by UNC and I & M, thereby forcing piecemeal litigation. In equity and good conscience, the court cannot countenance the continuation of this lawsuit without the presence of UNC when to do so would likely result in duplicative litigation, possible prejudice, and incomplete resolution of the matters at issue.

The court is not unmindful of difficulties to be faced following a dismissal of the instant case. As plaintiff in its motion to amend its complaint points out, the federal courts have exclusive jurisdiction over antitrust claims: a decision affecting the three disputants in state court will likely leave the antitrust problem undecided. See *Lyons* v. *Westinghouse Electric Corporation,* 222 F.2d 184 (2d Cir. 1955). That concern is manageable, however; the federal court in Albuquerque, first seized of the general subject matter in the case between UNC and I & M, is an available forum for the antitrust claims. I & M should be able to achieve that outcome by ending its evident, if merely "passive," resistance to GAC's entry as a party to that case.

Finally, even if the three parties are together in a single lawsuit in the New Mexico federal court, the matters at issue between UNC and GAC may go unresolved because of the injunction of the New Mexico state court. As has been mentioned, that barrier may yet be removed. But even if it is not, the federal court is a preferable forum. At least, that earlier action, with GAC joined, can prevent prejudice and inconsistencies in the resolution of the common-law contract claims between I & M on the one hand and UNC and GAC on the other.

Defendant's motion to dismiss is granted. Plaintiff's motion to amend the complaint is denied. Settle an order.[2]

MARVIN E. FRANKEL
U.S.D.J.

Dated: New York, New York
January 5, 1976

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[2] The order to be settled should provide for fulfillment of the obligations undertaken by the parties pursuant to a consent order executed on May 19, 1976, providing for an interim uranium supply arrangement between plaintiff and defendant. It is to be hoped, therefore, that counsel will collaborate on an agreed form of order embodying both today's rulings dismissing the action and the continued performance under the order of May 19, 1976.

Supreme Court, U. S.
FILED
JUN 24 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No. 76-1640

GENERAL ATOMIC COMPANY, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,

Petitioner,

vs.

THE HONORABLE EDWIN L. FELTER, District Court Judge for the First Judicial District, Santa Fe County, New Mexico,

Respondent.

GENERAL ATOMIC COMPANY, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,

Petitioner,

vs.

UNITED NUCLEAR CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

OPINIONS AND ORDERS BELOW

Petitioner General Atomic Company ("GAC") has filed this Petition as a direct continuation of its Petition in Cause No. 76-385 ("Prior Petition"), in which it sought writs of certiorari directed to (a) the District Court of the First Judicial District, County of Sante Fe, New Mexico, (the "Santa Fe Court"), to review its order of injunction dated April 2, 1976 (the "Injunction"), and (b) the New Mexico

Supreme Court, to review its order entered June 16, 1976, which left the Injunction in effect.[1]

On November 29, 1976, this Court granted GAC's Prior Petition and on December 28, 1976, this Court issued its mandate ordering that the judgment of the Supreme Court of the State of New Mexico be vacated and that the cause be remanded to the Supreme Court of the State of New Mexico to consider whether its judgment was based on federal or state grounds, or both.

Subsequent to the issuance of this Court's mandate to the New Mexico Supreme Court, two opinions of significance to GAC's Petition have been issued. On January 5, 1977, Judge Frankel, presiding in the United States District Court for the Southern District of New York, issued his opinion dismissing Cause No. 76 Civ. 881 which was an action styled *Indiana and Michigan Electric Company v. Gulf Oil Corporation, et al.*, to which GAC was a party (the "I&M suit"). That opinion is annexed to GAC's Petition as Appendix E. On February 21, 1977, in response to the mandate of this Court, the Supreme Court of the State of New Mexico reaffirmed the judgment vacated by this Court, holding that *Donovan v. City of Dallas*, 377 U.S. 408 (1964) was inapplicable to the facts of this case and that the Santa Fe Court had acted within its jurisdiction in granting the Injunction. The Opinion and Order of the New Mexico Supreme Court is annexed to GAC's Petition as Appendix D.

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[1]The Prior Petition contained *only* the following two questions:

> "1. Can a state court in an *in personam* action constitutionally enjoin a defendant, also a defendant in a pending federal court action instituted by a different plaintiff, from impleading or moving to join pursuant to Fed. R. Civ. P. 14 or 19(a) the state court plaintiff as a party in such federal action?
>
> "2. Can a state court in an *in personam* action constitutionally enjoin a defendant from instituting an action in a federal court?" (Prior Petition, pp. 5-6)

Subsequent to this Court's order of November 29, 1976, counsel for respondent United Nuclear ("UNC") and for GAC transmitted letters to the then Chief Justice of the New Mexico Supreme Court. The letter from UNC's counsel, dated November 30, 1976, is reprinted and annexed hereto as Appendix A. The letter from GAC's counsel, dated December 6, 1976, is reprinted and annexed hereto as Appendix B. Also annexed hereto as Appendix C is an excerpt from the transcript of proceedings before the Honorable Edwin L. Felter in the District Court for the First Judicial District, Santa Fe County, New Mexico, on April 2, 1976, relating to the Injunction.

JURISDICTION

This Court Lacks Jurisdiction to Consider the Three Questions Presented in the Petition.

There are no cases or controversies, extant or threatened, within the scope of the first two questions presented in GAC's Petition. Thus, the issues raised by those questions are moot and this Court lacks jurisdiction to entertain them. This Court lacks jurisdiction to consider the issues raised in the third question presented in the Petition since they were not raised in the courts below or in GAC's Prior Petition.

1. *There Are No Cases Contemplated To Be Filed By GAC Against UNC In Federal Court Which Are Precluded By The Injunction.* GAC's first question presented is as follows:

> "Can a state court in an *in personam* action constitutionally enjoin a defendant from instituting an action in a federal court?"

Nowhere in its Petition does GAC claim, or even imply, that it would now institute additional litigation were it not precluded from doing so by the Injunction. Its argument under the first question presented is therefore illusory. GAC is seeking an advisory opinion on only a hypothetical set of facts since it suggests no action that it would take were the relief sought granted. A decision by this Court on issues

raised in GAC's first question will have no effect on the rights of either party in this case.

The first question GAC presents is thus entirely moot. The authorities supporting the argument that this Court lacks jurisdiction to decide this question are presented below in combination with UNC's jurisdictional argument on GAC's second question which, it is submitted, is also moot.

2. *There Is No Longer Any Action Pending In A Federal Court Where GAC Is Precluded By The Injunction From Joining UNC As A Party.* The second question presented by GAC in its Petition is:

> "2. Can a state court in an *in personam* action constitutionally enjoin a defendant from impleading or moving to join the state court plaintiff as a party in the federal court action previously instituted against the defendant by a different party, pursuant to Fed. R. Civ. P. 14 or 19(a)?"

UNC respectfully submits that this question is now moot, and that Article III of the United States Consititution precludes this Court from deciding it.

At the time GAC first petitioned this Court in its Cause No. 76-385 to review the second question presented in the instant Petition, the I&M suit was pending in the United States District Court for the Southern District of New York. After the Santa Fe Court issued its Injunction, GAC urged a dismissal of the I&M suit based upon its contention that UNC was an indispensable party to that action which could not be joined because of the New Mexico Injunction. After initially denying GAC's Motion to Dismiss the action, the court, on January 5, 1977, issued its Opinion granting GAC's Motion. (Opinion of Frankel, J., Appendix E to Petition.)

The I&M case was the only one that has ever fit the description of a case described in the second question in GAC's Petition and formed the cornerstone of GAC's argument in the Prior Petition (Prior Petition, pp. 2, 3, 10, 12

et seq.) Notwithstanding the dismissal of that case prior to the filing of its Petition, GAC has seen fit to continue to request that this Court decide a question which can no longer affect the rights of the litigants in this case. GAC had claimed that the Injunction "prevents petitioner from protecting itself as a defendant in the federal court through exercise of its rights to seek impleader or joinder of UNC***" (Prior Petition, p. 3). No other prejudice was suggested, then or now.

Following Judge Frankel's dismissal of the I&M suit, GAC moved to add I&M as a defendant in the Santa Fe County case. I&M then decided to forego appealing the dismissal of the I&M suit and acceded to GAC's Motion that it be joined in the Santa Fe County case and is presently a party to that action.[2] GAC now blandly points out that it has turned UNC's absence from the I&M case, of which it complained so bitterly, to its advantage. UNC's absence has resulted in GAC's victory. How is victory to be improved upon? By prevailing in the I&M case, GAC has further rendered its second question moot.

It is clear that federal courts are without power to decide questions that cannot affect the rights of the litigants in the case before them. This Court has recently reiterated that the inability of the federal judiciary "to review moot cases is derived from the requirements of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy." *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974). UNC respectfully submits that in view of the developments in the Santa Fe County case and in the related utility litigation summarized above, no controversy exists between the parties with respect to the issues raised in the second question

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[2] GAC's accusations that I&M and UNC have colluded to piecemeal issues between GAC and UNC is ridiculous. (*see* Prior Reply, pp. 8-9; Petition, p. 10; Appendix E to Petition, p. 4). If nothing else, I&M's decision not to appeal Judge Frankel's order dismissing the I&M suit and its decision to accede to GAC's joinder motion in the Santa Fe action indicate its desire to obtain a just and speedy resolution of the issues between it and GAC.

presented by GAC in its Petition and there is no way in which a decision by this Court on that question can affect the rights of the litigants in this case.

3. *GAC Has Not Heretofore Presented Any Claim of Rights Under the Federal Arbitration Act.* UNC respectfully submits that this Court lacks jurisdiction to review the issues in the third question presented by GAC in its Petition which relate to its alleged rights under the Federal Arbitration Act. Those issues were (i) never timely nor properly raised by GAC in the Santa Fe Court, (ii) never raised by GAC before the Supreme Court of New Mexico, and (iii) never raised by GAC in its Prior Petition for Certiorari before this Court in Cause No. 76-385.

Prior to its submission of this Petition, GAC did not, in any manner or at any time, question the power of the trial court to issue the Injunction in question insofar as that power might be limited by the language or spirit of the Federal Arbitration Act. From the time GAC first contested the Santa Fe Court's authority to issue that Injunction in its Response to UNC's Motion for a Preliminary Injunction and in its accompanying memorandum of law (Record: Vol. II, Ex. 12 to Response to Alternate Writ of Prohibition, p.26),[3] until the New Mexico Supreme Court issued its Order and Opinion on February 21, 1977, GAC never once presented to the courts of the State of New Mexico either of the issues raised in Question No. 3 of its Petition; nor has GAC even once cited or made the slightest reference to the Federal Arbitration Act in any pleading, legal memoranda, or oral argument submitted to any court prior to the filing of this Petition.[4] The record in this case in fact affirmatively reveals

[3] References to "Record" are references to the New Mexico Supreme Court record for General Atomic Company v. Edwin L. Felter (No. 10870).

[4] The fact that the Federal Arbitration Act issues raised in Question No. 3 of GAC's Petition have not heretofore been raised or considered in the New Mexico courts is borne out by GAC's failure to comply with the dictates of Rule 23(1)(f) of the Rules of the Supreme Court of the United States which require that a petitioner succinctly specify the stage in the prior proceedings and the manner in which it first raised the federal questions presented so as to give this Court jurisdiction to review them.

that GAC never raised either of the issues presented in Question No. 3 of its Petition either before the trial court or the Supreme Court of New Mexico.

GAC has broken down its third question which deals with the Federal Arbitration Act into two subparts. Subpart (a) is obscure. It poses the question whether a state court in an *in personam* action can constitutionally enjoin a defendant from:

> "(a) seeking to enforce its rights under the Federal Arbitration Act to require the state court plaintiff to arbitrate***" (*see* Petition, p. 4).

The purported issues raised for the first time in Question No. 3 of GAC's Petition confuse the facts in this case. Which federal rights to arbitrate have ever been raised by GAC in this case? Article XVII of the 1973 Uranium Supply Agreement sets forth an arbitration provision. Is GAC now asserting it has a right to resort to a federal court to compel UNC to arbitrate under Article XVII? If so, it is for the first time. No such contention has ever been made. While it is true that amongst the affirmative defenses included in GAC's Answer in the Sante Fe County case, it pleads a right to arbitration, GAC has never taken any steps to exercise that right. In fact, in a proceeding in the Santa Fe Court on April 2, 1976, during which the form of the proposed Injunction was under discussion, counsel for GAC asked that the Injunction be clear in excluding any prohibition against GAC's demanding arbitration in that case. During the discussion before the Santa Fe Court which followed, counsel for UNC made it clear that UNC's application for a preliminary injunction did not contemplate that GAC be enjoined from pursuing arbitration under the arbitration clause of the 1973 Supply Agreement. UNC's counsel expressed his opinion that, in any event, GAC's right to arbitration had been waived (*see* Appendix C hereto).

Actions taken subsequently by GAC's counsel make it clear that GAC's alleged rights under the Federal Arbitration

Act were never addressed to or considered by the New Mexico Supreme Court. GAC has not cited anything in the excerpts it quoted from the June 16, 1976 hearing before the New Mexico Supreme Court (Appendix E to Prior Petition), or anywhere else which reveals even a passing reference to the Federal Arbitration Act. Nor was any such question raised before the New Mexico Supreme Court following the remand by this Court. In fact, the contrary appears. On December 6, 1976, GAC's counsel, Mr. William R. Federici, now a justice of the New Mexico Supreme Court, sent a letter to the then Chief Justice of the New Mexico Supreme Court. GAC therein conclusively laid to rest any contention that the New Mexico Supreme Court had before it, or was asked to decide, any issue concerning the Federal Arbitration Act. That letter states, in pertinent part:

> "***we do respectfully call the Court's attention to the fact that the subject matter of GAC's petition for certiorari was the propriety of Judge Felter's Injunction only in so far as it restrained GAC from initiating proceedings in *federal* courts. In their previous briefs, and argument before this Court, both parties addressed *that* issue only as to whether the District Court had jurisdiction under the supremacy clause and *Donovan*." (emphasis supplied by Justice Federici) (Appendix B hereto, p. 3)

With regard to subpart (b) of the second question presented by GAC, little need be said. That subpart attempts to raise a hitherto unasserted proposition concerning arbitration in relation to claims over against UNC in a pending arbitration. Presumably, GAC is referring here to the Commonwealth Edison and Duke arbitration proceedings. GAC's right to arbitrate with UNC arises out of the 1973 Supply Agreement which is being contested before the Santa Fe Court. GAC has never pursued an arbitration demand against UNC in the Santa Fe Court, and the Injunction never prohibited it from doing so.

GAC's failure to properly raise either of the issues contained in Question No. 3 of its Petition meant that neither

the Santa Fe Court nor the Supreme Court of New Mexico ever had the opportunity to consider or pass upon any claims or questions in this case which related in any way to the Federal Arbitration Act. Indeed, once GAC had failed to properly raise any issue relating to the Federal Arbitration Act before Judge Felter in the Santa Fe Court, it had waived its right to present that issue in its petition for a writ of prohibition submitted to the Supreme Court of New Mexico. It is not surprising, therefore, that the Order and Opinion of the New Mexico Supreme Court did not consider or dispose of any claim by GAC that the Santa Fe Court's Injunction had violated the spirit or language of the Federal Arbitration Act.

GAC's assertion of Federal Arbitration Act rights is doubly inappropriate because review of those issues does not fall within the scope of this Court's mandate in Cause No. 76-385. While GAC begins the instant Petition with the statement that "This petition by General Atomic Company ("GAC") is a direct continuation of Cause #76-385, . . .", it is attempting here to seek this Court's review of Federal Arbitration Act issues which were not raised in its Prior Petition. Even had Petitioner properly presented and preserved issues relating to the Federal Arbitration Act in the state courts of New Mexico, it would have been improper for it to raise such issues in view of the mandate.

UNC submits that GAC's addition of Federal Arbitration Act issues at this stage of the litigation can only be regarded as an attempt to pump new life into a Petition which otherwise retains no vitality.

The principle that an appellate court considers only those questions which were raised and passed upon in the lower courts applies to cases reviewed by this Court, whether the mode of review is by appeal or by certiorari. *Michel v. Louisiana*, 350 U.S. 91 (1955). This Court has repeatedly maintained that it has no jurisdiction to review issues which were not raised at trial, were not raised at the state appellate level, and were not raised in a former petition for certiorari to this Court. *Brown v. Allen*, 344 U.S. 443, 480 (1953); *F. D. Rich Company, Inc. v. United States Industrial Lbr.*

Company, Inc., 417 U.S. 116, 122 n.6 (1974); *see generally* Annot., 32 L.Ed. 2d 830, §3[a], [b] (1973). In *Irvine v. People of State of California*, 347 U.S. 128, 129 (1954), this Court pointed out that it did not approve of "the practice of smuggling additional questions into a case after we grant certiorari."

The fact that one federal question was properly raised does not authorize this Court to search the record for other federal questions which have not been properly raised. *Wilson, et al. v. Cook*, 327 U.S. 474 (1946).[5] The rule requiring that all federal questions be first properly presented in state court applies even where an inspection of the record shows the existence of facts upon which the additional federal question might have been raised, but was not. *Dewey v. City of Des Moines*, 173 U.S. 193 (1899).

This Court has previously ruled that it will consider only the precise federal questions raised in the state courts and parties may enlarge upon their arguments in that regard only if the same arguments were raised in the state courts. *Wilson, et al. v. Cook, supra; McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430 (1940). The decisions discussing the particularity required for raising a federal question indicate that this Court must be able to see clearly, from the whole record, that a certain provision of the Constitution or act of Congress was relied on in the courts below. *New York ex rel. Bryant v. Zimmerman, et al.*, 278 U.S. 63 (1928). Where a claim is allegedly based upon a particular statute, reliance upon that statute must have been clearly shown in the courts below if this Court is to have jurisdiction to review upon certiorari legal questions based directly upon that statute. *See Michigan Sugar Company v. Dix*, 185 U.S. 112 (1902).

Any claim by GAC that issues relating to the Federal Arbitration Act were in any way presented or considered in

[5]This rule applies even if the same provision of the Constitution is the basis for both federal claims.

the courts of New Mexico, thereby entitling it to raise the issues presented in Question No. 3 of the instant Petition, is totally inconsistent with its failure heretofore to make even a passing reference to that federal statute in connection with any of its objections to the Santa Fe Court Injunction.

The decisions of this Court make it clear that GAC's failure to specifically and precisely raise claims asserted under the Federal Arbitration Act in the lower courts is fatal to its Petition insofar as the issues raised by Question No. 3 are concerned. UNC therefore respectfully submits that GAC's submission of any issues and accompanying argument pertaining to the Federal Arbitration Act in the instant Petition is wholly improper and should not be considered by this Court.

QUESTIONS PRESENTED

1. Does Article III of the Constitution preclude this Court from deciding the issues raised in the first two questions presented in the Petition where (i) there are no cases contemplated to be filed by GAC against UNC in federal court which are precluded by the Injunction and (ii) there is no longer any action pending in a federal court where GAC is precluded by the Injunction from joining UNC as a party?

2. Does this Court have jurisdiction to decide questions based upon rights asserted under the Federal Arbitration Act which have not been raised heretofore by the parties or considered by the courts of the State of New Mexico and which were not presented in GAC's Prior Petition?

3. Notwithstanding the mootness of the three questions presented in the Petition, can a state court in an *in personam* action enjoin a defendant from instituting vexatious, harassing, multiplicitous litigation in the federal courts regarding the subject matter and issues of the pending case?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The additional constitutional and statutory provisions involved are U. S. Const. Art. III, §2 and U. S. Sup. Ct. Rule 23(1)(f), 28 U.S.C., which provides, in pertinent part:

U.S. Const. Art. III §2:

> "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State, or the citizens thereof, and foreign States, citizens or subjects."

U. S. Sup. Ct. R. 23 (1)(f), 28 U.S.C.:

> "If review of the judgment of a state court is sought, a statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the Federal questions sought to be reviewed were raised; the method of raising them (e.g. by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g. ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

STATEMENT

GAC's Statement is incomplete and misleading. For example, its first sentence reads:

> "The action below is one of several lawsuits arising from five contracts entered into by UNC and four utilities providing for the supply by UNC of uranium and uranium fuel assemblies ('the utility contracts')." (Petition, p. 7)

The quoted statement is 40% incorrect as to the number of utility contracts and 50% wrong as to the number of utilities with whom UNC contracted.[6] It is an oversimplification to depict GAC as succeeding to UNC's rights and obligations.[7]

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[6] UNC entered into two contracts with Commonwealth Edison ("Commonwealth"). On one of them ("Dresden") uranium deliveries are current. The other ("La Salle") is in arbitration in which both GAC and UNC are parties. UNC also contracted with I&M. I&M is a defendant in the Santa Fe County Case, having acceded to GAC's motion to make it a party.

When Gulf United Nuclear Fuels ("GUNF") was formed, mere letters of intent existed between UNC and The Duke Power Company ("Duke") and the Detroit Edison Company ("Detroit"). Duke contracted with GUNF after UNC's departure when UNC was not even a stockholder. Detroit also contracted with GUNF. That contract was superseded by a new agreement between Duke and GAC.

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[7] The sequence of events was that in 1971 UNC had a promising but under-capitalized light water reactor nuclear fuel fabrication enterprise. In that year, it contributed that portion of its business to GUNF, a corporation in which Gulf Oil Corporation ("Gulf") was the majority stockholder. In 1973, Gulf acquired UNC's stock in GUNF. GUNF was then operated for a time as a wholly owned subsidiary of Gulf until it was dissolved and merged into Gulf. Later still, Gulf formed the partnership GAC with Scallop Nuclear, one of the Royal Dutch/Shell Group of companies. Gulf placed into GAC at least most of the GUNF assets and liabilities. UNC asserts in the Santa Fe litigation that the evolution recounted in this footnote was attended, *inter alia*, with fraud, economic coercion, violation of the New Mexico Anti-Monopoly Statutes, and breaches of fiduciary duties on the part of Gulf.

The 1973 Uranium Supply Agreement, its validity and construction, is the focal point of the Santa Fe case. GAC quotes the portion of Article IV which, UNC contends, establishes this phase of the Agreement as a requirements-type contract of GUNFC which, no longer existing, no longer has requirements, and as a result of which UNC has no further obligations. But this portion of the Agreement relates to only 6,460,000 pounds of U_3O_8 .

More significant is Article V which provides:

> "In addition to the Concentrates mentioned in Article IV, UNC shall sell to the Corporation and the Corporation shall purchase from UNC those amounts of U_3O_8 specified in Exhibit "C" hereto. Said U_3O_8 shall be provided in accordance with the terms and conditions, including price, of the applicable UNC Agreements, except that (a) the amounts shall not be subject to adjustment either up or down and (b) whether or not delivery has been deferred or cancelled by the buyer pursuant to the applicable UNC Agreement, the Corporation shall in any event take delivery of such Concentrates in the Year specified in Exhibit 'C' " (Record: Vo. I, Ex. 5 to First Amended Complaint, p. 138 at 144).

Article V purports to relate to 16,167,000 pounds. GAC's repeated implications that this controversy stems from UNC's efforts to obtain windfall profits is a distortion of the grossest sort, and an attempt to divert attention from GAC's objectives.

For example, in the Commonwealth and Duke arbitration proceedings, GAC asserts that it is not obligated to make further deliveries. Similar contentions are being advanced by GAC against I&M and Detroit in the Santa Fe case. Yet,

GAC has and will contend that UNC is nevertheless obligated to deliver to it Article V uranium at the contract price.[8]

If attempts to better one's profit picture are opprobrious, as GAC implies, the onus should be shared equally. The prime difference is that GAC attacks the utility contracts and UNC the 1973 Uranium Supply Agreement.

GAC speaks of UNC having "guaranteed GUNFC's performance of the utility contracts" (Petition, p. 7). This statement is partially accurate, at least insofar as GUNF is concerned. However, GUNF no longer exists. It was dissolved by procedures undertaken by Gulf of which UNC had no knowledge and in which it played no part. There is no guaranty by UNC of GAC's performance of any contract.

The contracts asserted by Duke and Detroit did not even exist at the time of the formation of GUNF or the execution of the guaranty documents. Only letters of intent then existed. Whatever the nature of UNC's contractual obligations which were assigned to GUNF arising from the letters of intent, those letters of intent became *functus officio* upon execution of the contracts by Duke and Detroit with GUNF, as did the guarantees thereof. No guaranty was ever delivered to Detroit in any case. Finally, on the subject of "guarantees" of the utility contracts, UNC would point out that by a document dated September 12, 1973, and executed in connection with UNC's departure from GUNF, Gulf indemnified UNC

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[8] As an example of the monetary effect involved here, Article V deliveries to Commonwealth are estimated in the 1973 Uranium Supply Agreement to amount to 6,356,000 pounds for the La Salle reactors. At a base price of $8.66 per pound, a total of $55,042,960 is involved. If GAC succeeded in avoiding this liability while holding UNC to the Supply Agreement, GAC would be able to garner profits of $211,909,040 on the Commonwealth uranium alone computed at a current spot sale price of $42 per pound. These deliveries are scheduled into 1986. Future prices may rise.

against claims and liability under its supposed guaranty of utility contracts.[9] GAC, in turn, by an Assignment and Assumption Agreement dated April 29, 1974, assumed the liabilities of Gulf under this indemnification of UNC[10] and

[9]Paragraph 6 of the document in question provides:

"On and after the Closing Date, Gulf shall indemnify and hold UNC harmless from and against any and all claims, causes of action, liabilities, obligations, damages, costs and expenses (including reasonable costs and expenses of attorneys and accountants) arising out of, or in any way connected with or relating to (i) any debt, obligation, liability or duty which, at any time on or before the Closing Date, the Corporation shall have assumed or agreed to perform or discharge or (ii) any debt, obligation, liability or duty the performance or discharge of which by the Corporation has been guaranteed by UNC. Any provision hereof to the contrary notwithstanding, Gulf shall not be obligated hereunder to indemnify or hold UNC harmless from anything resulting by reason of any breach by UNC of the agreements described in Exhibit C hereto." (Record: Ex. 6 to First Amended Complaint, Vol. I, pp. 168, 170)

The utility contracts are not enumerated in Exhibit C.

[10]Paragraph 2 of that document provides:

"Assumption of Liabilities. Pursuant to the aforementioned authorization and in consideration of the transfer by Gulf of the assets and property described in Schedule A, the Transferee agrees that from and after January 1, 1974, the Transferee shall be liable for and hereby assumes and agrees to pay, perform and discharge all liabilities of Gulf described in Schedule B, which is hereby made a part of this Assignment and Assumption. (Record: Ex. 32 to Response to Alternative Writ of Prohibition, Vol. III, pp. 655, 658)."

Paragraph V. C. of Schedule B, attached to the Assignment and Assumption Agreement, provides:

"Under Agreement between United Nuclear Corporation, Gulf Oil Corporation and Gulf United Nuclear Fuels Corporation dated September 12, 1973, Gulf agreed to indemnify and hold United Nuclear Corporation harmless from and against any and all claims, causes of action, liabilities, obligations, damages, costs and expenses (including reasonable costs and expenses of attorneys and accountants) arising out of, or in any way connected with or related to the activities of Gulf United Nuclear Fuels Corporation" (Record: Ex. 32 to Response to Alternative Writ of Prohibition, Vol. III, p. 655 at 683).

indemnified Gulf against such liabilities in paragraph 4 thereof.[11]

GAC's Statement continues to infer that there exists some sinister conspiracy among UNC and certain utilities aimed at depriving GAC of its day in court which is supposedly evidenced by the failure of those utilities to pursue their contract claims directly against UNC in litigation and arbitration as GAC would wish (Petition, pp. 10, 13).[12] The fact that GAC is the primary obligor on the utility contracts is a sufficient answer to the query, posed by GAC with an air of puzzlement, as to why the utilities seek performance from it. The utilities have no reason to try to fight their way past the impediments we have recounted to establish liability on the so-called guarantees of UNC. It is doubtful that Duke or Detroit can even establish a contractual relationship with UNC. Whatever the practicalities which may have dictated

[11]Paragraph 4 of that document provides, in pertinent part:

"Indemnification of Gulf. The Transferee agrees to exonerate, indemnify and hold harmless Gulf against all liabilities and obligations arising from any and all actions, suits, proceedings and demands at any time instituted or made against Gulf with respect to the debts, liabilities, contracts, commitments and obligations of Gulf assumed by the Transferee hereunder, and to reimburse Gulf for any expenses (including attorneys' fees) reasonably incurred in connection therewith, all to the extent such debts, liabilities, contracts, commitments and obligations are to be paid or performed after December 31, 1973, ***" (Record: Ex. 32 to Response to Alternative Writ of Prohibition, Vol. III, p. 655 at 658).

[12]This accusation has become a recurring theme in GAC's presentations to various forums in which disputes which are only related to the issues in the Santa Fe case are being heard. GAC has gone so far as to characterize the sharing of the fruits of discovery as a "sweetheart agreement" (*see* Appendix E to Petition, p. 4, n.1).

the litigation choices made by the various utilities,[13] there can be no doubt of a party's right to select whom it will pursue as a defendant.

GAC's Statement maintains that it has demanded arbitration with UNC in the Santa Fe Court and implies that it has been thwarted in this effort by the Injunction (Petition, p. 15). GAC has never prosecuted the demand for arbitration contained in its Answer. The Injunction does not purport to preclude GAC from so doing.[14]

Finally, UNC will respond one last time to those portions of GAC's Statement and Reasons in the Petition setting forth its often repeated claim that the Injunction has prevented it from seeking one forum wherein it will not be exposed to what it feels are "inconsistent results." This claim has, by now, worn thin indeed.

The fact is that GAC has never exhibited any sincere desire to obtain a federal forum in which it would be willing to directly confront UNC with the issues arising under its contracts with UNC. The issues of the Santa Fe case so far as UNC and GAC are concerned include, *inter alia*, construction of the 1973 Uranium Supply Agreement, as well as other

[13]Certain of the utility contracts are not merely for uranium deliveries, but also include uranium fuel fabrication. The I&M and Duke contracts call for this service. UNC had been in fuel fabrication prior to putting that portion of its business into GUNF. It departed from GUNF by a sale of its stock. It emerged from its venture with Gulf shorn of its fuel fabrication capabilities. It thus lacks the ability to perform contracts calling for fabrication.

[14]The arbitration demand contained in GAC's Answer to the Complaint in the Santa Fe case has not been made a part of the Record before this Court. This omission is not surprising since the arguments in the instant Petition relating to GAC's purported arbitration rights as they relate to the Injunction have not been raised heretofore. To the contrary, statements made by counsel for UNC and GAC at a hearing before the Santa Fe Court on April 2, 1976, reveal that counsel understood at that time that GAC's arbitration rights vis-a-vis UNC were not in any way abridged by the Injunction (*see* Appendix C hereto).

documents, commercial impracticability in UNC's performance of it, fraud, economic coercion, violation of fiducial duties and violations of the New Mexico Anti-Monopoly Acts. On January 19, 1976, UNC first sought (unsuccessfully) an injunction against GAC. While counsel were at the Santa Fe Courthouse grappling with this problem, GAC filed the Interpleader case against UNC and four utilities in the New Mexico Federal District Court (Petition, p. 8). That action was dismissed by the District Court because the form of litigation which GAC proposed to establish in the federal court was not truly in the nature of interpleader and was therefore not within the court's jurisdiction under the federal interpleader statute.[15]

By pursuing interpleader, GAC was not seeking to have the "entire controversy" between it and UNC adjudicated. Rather, GAC sought to stand aside from its controversies with UNC while fomenting controversies between UNC and the utilities where none existed. Furthermore, GAC never made any attempt to expand its alleged interpleader action by amendment so as to bring within its scope the controversies being litigated in the Santa Fe Court.

On January 20, 1976, the day after it filed the Interpleader action, Gulf filed its declaratory judgment action against UNC in the same federal court regarding the validity of an alleged release from UNC (*see* UNC's Prior Brief in Opposition to the Prior Petition, "Prior Opposition", p. 10). Being excepted from the Injunction, it could have been restructured by adding parties. Gulf could have added GAC. It could have moved to join the utilities. This was done successfully by GAC as to I&M and Detroit in the Santa Fe case. Gulf could have moved to expand the issues to encompass those pending in Santa Fe.[16] It did not. GAC can

[15]On April 8, 1977, the United States Court of Appeals for the Tenth Circuit affirmed the judgment of the United States District Court for the District of New Mexico in that case styled *General Atomic Co. v. Duke Power, et al.*, (the "Interpleader action") dismissing GAC's action in the nature of interpleader.

[16]After the Injunction was issued, Gulf did in fact expand the issues by amendment, though not in any meaningful way. The amended complaint added a count for reformation and another for specific performance.

point to no attempt made by it or its constituent partners to bring the issues presented in the Santa Fe case squarely under one federal roof.

REASONS FOR NOT GRANTING THE WRIT

UNC has argued that this Court lacks jurisdiction to review the three questions presented in GAC's Petition because the issues raised therein are either now moot or were not raised in the courts below. Notwithstanding those jurisdictional arguments, UNC submits that GAC's objections to the Injunction cannot stand on their merits.

Neither Donovan v. City of Dallas Nor the United States Constitution Prohibits the Injunction Issued in this Case. The thrust of the first question presented in GAC's Petition remains based upon GAC's contention that *Donovan v. City of Dallas*, 377 U.S. 408 (1964), deprives a state court of the opportunity to protect its jurisdiction and prevent misuse of the judicial system by enjoining a party from instituting further piecemeal, vexatious, harassing litigation in federal courts where jurisdiction has not yet attached over the parties and the subject matter of their dispute. In its Prior Brief in Opposition to GAC's Prior Petition, UNC submitted to this Court that there was nothing in *Donovan*, its progeny, or the Constitution which prohibits the Injunction issued by the trial court in this case (*see* Prior Opposition, p. 17). The Order and Opinion of the Supreme Court of the State of New Mexico sets forth in detail the factual underpinnings and legal conclusions which supported its decision to quash the alternative writ of prohibition sought by GAC. That Order and Opinion reveals the careful consideration given by the New Mexico Supreme Court to the factual record upon which the trial court based its issuance of the Injunction and to the unambiguous dictates of this Court's decision in *Donovan*. The Order and Opinion of the New Mexico Supreme Court fully supports UNC's contention that *Donovan* has no application to the facts of this case.

In its Order and Opinion, the New Mexico Supreme Court concluded:

> "The thrust of GAC's challenge, however, goes mainly to that portion of the injunction which restrains it from instituting further suits in federal court. GAC relies on Donovan v. City of Dallas, 377 U.S. 408 (1964), for the proposition that a state court is absolutely prohibited from interfering with the right of a party to bring multiple actions designed to harass and oppress its opponent so long as the party resorts to the federal forum. As a matter of state law, we hold that, under these circumstances, a district court has inherent equity powers to order such a restraint. We do not think that Donovan is applicable where a party is currently proceeding in federal court and where any further federal action would be based upon the same issues and events for the purposes of harassment. We do not believe that Donovan removes all equity powers from the jurisdiction of state courts whenever a party resorts to a federal forum". (Appendix D to Petition, p. 7).

The New Mexico Supreme Court's Opinion indicates that that court fully acknowledged and respected the specific holding of this Court in *Donovan* and declined to read into the concise language of that holding the type of broad prohibition against state court injunctions which GAC advances in its Petition. Fully cognizant of the substantial factual distinction between this case and the *Donovan* case, the New Mexico Supreme Court stated:

> "The issue considered in Donovan is not present in the instant case and the rationale for that decision is inapplicable to the facts before the district court. The injunction which was issued does not directly or indirectly affect any proceeding in the district court or appellate courts of the United States where jurisdiction has attached. Those suits which were pending in federal court were exempted from the terms of the injunction. The injunction is directed only towards the institution of

future litigation wherein no federal or state court has yet to acquire jurisdiction.

"GAC contends that this is a distinction without a difference but when the rationale behind the decision is applied to these facts we find that the district court did not run afoul of the dictates of Donovan. The injunction does not offend any interest of comity; the parties are not restrained from proceeding with the suits wherein the foreign court has exercised its jurisdiction. The district court carefully defined the parameters of the injunction to avoid such a conflict" (Appendix D to Petition, pp. 8-9).

The arguments submitted by GAC in support of the proposition that the Injunction in this case violates the dictates of *Donovan* have not changed in any respect as a result of the publication of the Order and Opinion of the Supreme Court of New Mexico. Insofar as the instant Petition attempts to reassert those arguments contained in GAC's Prior Petition, UNC respectfully refers this Court to UNC's Prior Brief in Opposition to that Petition (Prior Opposition, pp. 17-18). It is here intended to merely summarize those arguments already presented by UNC and to respond more specifically to those matters raised by the Order and Opinion of the Supreme Court of New Mexico and the instant Petition by GAC based thereon.

The Supreme Court of New Mexico concluded correctly that in *Donovan*, this Court did not consider the question of whether a state court could enjoin a party from instituting a third federal suit in a federal court where jurisdiction had not attached to protect another party from harassment and oppression.

GAC complains that the New Mexico Supreme Court's restriction of *Donovan* to proceedings where federal jurisdiction has attached prior to the issuance of the state court injunction is inconsistent with the opinion in that case (*see* Appendix D to Petition, pp. 7-9; Petition, pp. 17-18). GAC's argument in this regard is apparently based upon the

fact that some of the original federal court plaintiffs in the *Donovan* case were cited for contempt by the Texas Court of Civil Appeals for having instituted a new federal action after the state court injunction had been issued. However, UNC respectfully submits that if GAC bases its argument squarely upon the opinion of this Court in *Donovan v. City of Dallas*, it is that opinion upon which this Court should focus at this time, rather than the action taken by the Texas appellate court in 1963. In this regard, the chronology of events leading up to this Court's opinion in *Donovan* and this Court's concomitant narrow grant of certiorari in that case are instructive.

The original Love Airport proceeding was fully litigated in *Atkinson v. City of Dallas*, 353 S.W.2d 275 (Tex. Civ. App. 1961). Both the Supreme Court of Texas and the United States Supreme Court thereupon declined to review the decision in that case (*see* 370 U.S. 939 (1962)). On September 24, 1962, Donovan and others filed an action in the Federal District Court for the Northern District of Texas which was styled *Brown et al. v. City of Dallas et al.*, No. 9276, which presented the same issues as were presented in the *Atkinson* case, *supra*. The City of Dallas then petitioned the Texas Court of Civil Appeals for a writ of prohibition restraining Donovan and others from continuing to prosecute that proceeding then pending in the Federal District Court for the Northern District of Texas. That petition was denied. *City of Dallas v. Brown*, 362 S.W. 2d 372 (Tex. Civ. App. 1962). Thereupon, in a petition for mandamus, the City of Dallas asked the Supreme Court of Texas to direct the lower court to issue the writ of prohibition prayed for in *City of Dallas v. Brown, supra. City of Dallas v. Dixon*, 365 S.W. 2d 919 (Tex. 1963). The Supreme Court of Texas then declared that the lower court had the power to enjoin Donovan and others from proceeding in the Federal District Court action then pending and commanded that court to issue the writ of prohibition prayed for by the City of Dallas. It was this judgment by the Texas Supreme Court, along with the subsequent contempt citations whch grew out of that

erroneous judgment, which this Court decided to review in *Donovan v. City of Dallas* (see 377 U.S. at 411). [17]

When the Texas Supreme Court handed down its erroneous judgment in *City of Dallas v. Dixon, supra,* that court was faced solely with the issue of whether or not a state court had the power to enjoin a party from proceeding to prosecute an action where jurisdiction had already attached in a federal court, namely, the action pending in the United States District Court for the Northern District of Texas. Had the Texas Supreme Court in *City of Dallas v. Dixon* correctly ruled that a state court had no such power, Donovan and the other plaintiffs would not have been compelled to institute a new action in federal court, styled *Donovan v. Supreme Court of Texas,* No. CA-3-63-120 (N.D. Tex. *dismissed* May 9, 1963), *cert. denied,* 375 U.S. 878 (1963), which constituted an attempt to enjoin the Texas courts from interfering with their right to proceed in *Brown v. City of Dallas,* a pending action where jurisdiction had already attached.

In *Donovan,* this Court squarely attacked the judgment of the Texas Supreme Court in *City of Dallas v. Dixon, supra,* a judgment which asserted only that a state court had the power to enjoin a party from proceeding in a federal forum where jurisdiction had already attached. This Court then issued the following decision:

> "*** we think the Texas Court of Civil Appeals was right in its first holding that it was without power to enjoin the litigants *from prosecuting their federal court action,* and we therefore reverse the State Supreme Court's judgment upsetting that of the Court of Appeals. We vacate the later contempt judgment of the Court of Civil Appeals, which rested on the mistaken belief that the

[17] This Court's narrow grant of certiorari in *Donovan* was set forth in full in UNC's Prior Opposition (*see* Prior Opposition, p. 20).

> writ prohibiting litigation by the federal plaintiffs was 'valid'." 377 U.S. at 411 (emphasis added).

While it is acknowledged that a number of the plaintiffs involved in the litigation leading up to *Donovan v. City of Dallas* were cited for contempt for instituting new federal actions as well as for having continued to prosecute federal actions where jurisdiction had already attached, this fact should not be used to distort this Court's narrowly circumscribed holding into a broad prohibition which would prevent state courts from preventing the institution of vexatious, harassing and multiplicitous litigation in special cases where a party is intending to abuse its right to seek a federal forum. The language used by this Court throughout its opinion in *Donovan* was clearly restricted to the problems of comity raised where a state court attempts to wrest from a party its right to prosecute a suit in federal court where jurisdiction has attached. This Court's vacation of the contempt judgment of the Texas Court of Civil Appeals was an action which judicial administration required because that judgment was based upon an erroneous decision by the Texas Supreme Court. Once this Court had decided that the Texas Supreme Court had erred in mandating that the Texas Court of Appeals should proceed to issue the injunction requested, it became clear that any contempt citation based upon that erroneous decision, no matter what its scope or language, could not stand.

GAC's request that this Court interpret the *Donovan* opinion, which was so narrowly drawn, by examining the contempt citation of the Texas Court of Civil Appeals rather than the explicit language in the opinion, makes little sense. Such a strained interpretation of the clear language of a written opinion of this Court should not be adopted.

There is little similarity between *Donovan,* where the plaintiffs were merely attempting to relitigate in federal court issues already finally decided, and the instant case, where GAC has attempted to drag UNC into as many federal forums at one time as possible.

Despite the unchallenged finding of fact by the Santa Fe Court that the institution of suits by GAC in addition to those already pending would be contrary to the speedy and orderly administration of justice and would irreparably harm UNC,[18] GAC continues to maintain in its Petition that *Donovan* is controlling in this case. GAC also persists in maintaining that there was no basis for the Santa Fe Court's finding of fact in its preliminary injunction that the institution of additional legal proceedings would have been vexatious, harassing and multiplicitous. Nevertheless, as UNC has already set forth in greater detail in its Prior Opposition Brief, that finding of fact was made by the trial court after it had denied UNC's first application for a temporary restraining order and GAC then chose to undertake a series of actions which convinced the court that GAC was intending to embark upon a strategy of instituting oppressive litigation throughout the country contrary to the speedy and orderly administration of justice (*see* Prior Opposition, pp. 19-22).

The Order and Opinion of the New Mexico Supreme Court in this case fully supports UNC's contention in its Prior Opposition Brief that the Santa Fe Court issued its Injunction in this case based upon an entirely different set of facts and equitable considerations than those present in *Donovan* (*see* Appendix D to Petition, p. 7). Faced with a situation in which its adversary made clear its intention to draw upon the vast resources of its constituent partners in order to pursue a plan of piecemeal litigation throughout the nation so as to circumvent the orderly and speedy resolution of disputes already pending in the state and federal courts of New Mexico, UNC appealed to the trial court for equitable protection. GAC was unable to convince the trial judge that its intended plan of multiplicitous litigation had any purpose other than to harass UNC and the court issued its Injunction based upon appropriate findings of fact which were set forth therein and which have never been properly challenged.

[18] *See* the Santa Fe Court's Preliminary Injunction at Appendix A to the Petition, p. 2.

Any suggestion by GAC that the Supreme Court of New Mexico was ignorant of the facts underpinning the Injunction is preposterous given the extensive briefing submitted by both parties to that court and its comprehensive Order and Opinion entered on February 21, 1977.[19] The record presented to the New Mexico Supreme Court prior to its decision to quash GAC's writ as having been improvidently granted was clear and complete and the subsequent opinion entered by that court was squarely based upon that record (*see* Appendix D to Petition, p.7).

GAC's Petition suggests that the New Mexico Supreme Court was insensitive to its position and was ignorant of the dictates of the *Donovan* decision when it ruled that the trial court's factual findings fully supported its conclusion that "any further federal action would be based on the same issues and events for the purpose of harassment" (Petition, pp. 18-20). However, the Opinion of the New Mexico Supreme Court

[19] GAC casts various aspersions at the New Mexico Supreme Court. For instance, GAC asserts it is "fair to say" that the court "has not yet manifested an understanding" of how GAC's constitutional rights were prejudiced by the injunction. It charitably says that the New Mexico Supreme Court "did not have the benefit of the parties' views concerning either this court's disposition of the Prior Petition or the continuing effect of the Injunction on GAC in proceedings outside New Mexico" (*see* Petition, p. 19). GAC had ample opportunity to present to both the District Court and Supreme Court of New Mexico its version of the facts in its Response to UNC's motion for the preliminary injunction, its Petition and Supplementary Petition to the Supreme Court of the State of New Mexico for a Writ of Prohibition or a Writ of Superintending Control and in the accompanying legal memoranda and briefs submitted to those courts. UNC believes that it would be fair to say that both prior to and after this Court's remand, the New Mexico Supreme Court was fully informed of developments in this case, which GAC claims have operated to its prejudice. This is so because, along with the letter which is Appendix A hereto, that court was provided with the text of this Court's order of November 29, 1976, and five copies of each brief filed by each party in Cause No. 76-385. Additionally, the New Mexico Supreme Court had the benefit of the oral arguments of the parties in the original prohibition proceeding presented on June 16, 1976.

makes it clear that, in reaffirming the Santa Fe Court's right to issue the Injunction, it closely examined GAC's alleged plight in conjunction with the precise dictates of *Donovan*. That Opinion indicates that, at the time that the Supreme Court of New Mexico quashed the alternative writ of prohibition sought by GAC as having been improvidently granted, GAC already had access to three forums (two federal and one state) in which all of its claims could have been presented. Just as the Santa Fe Court remained unpersuaded by GAC's convoluted claims of prejudice in light of the unique factual background presented, so did the New Mexico Supreme Court reject those arguments (Appendix D to Petition, p. 9). GAC's repeated cries of deprivation of a federal right to access to federal forums in light of *Donovan* runs contrary to the facts of this case and distorts the teaching of this Court in *Donovan*.

Faced with a unique set of facts entirely distinguishable from that in the *Donovan* case, the Supreme Court of the State of New Mexico recognized that "The underlying issue before us is whether the District Court may restrict the future acts of a party who is bringing vexatious and oppressive litigation in multiple jurisdictions for the purpose of harassment" (Appendix D to Petition, p. 9). UNC respectfully submits that the New Mexico Supreme Court was correct when it concluded that it did "not believe that *Donovan* removes all equity powers from the jurisdiction of state courts whenever a party resorts to a federal forum" (Appendix D to Petition, p. 7). That was the basis for that court's holding that the Santa Fe Court had acted within its jurisdiction in granting the Injunction and for its decision to quash GAC's writ as having been improvidently granted because this was not a proper case for the invocation of the remedy of prohibition (Appendix D to Petition, p. 10).

UNC submits there is also nothing in *Donovan* or the Constitution which prohibited the trial court from applying its Injunction to GAC's attempt to join UNC as a party to the I&M suit in New York. The Supreme Court of New Mexico

concurred with UNC that the rule announced in *Donovan* applied only to an injunction which purported to enjoin a party from proceeding to prosecute an action in a federal forum where jurisdiction had already attached. When the Santa Fe court issued its Injunction, the United States District Court of the Southern District of New York had neither personal jurisdiction over UNC nor subject matter jurisdiction over the issues disputed directly between UNC and GAC.[20]

A final comment need be made with respect to GAC's argument that the arbitration proceedings now pending between GAC and certain utilities expose GAC to great prejudice as a result of possible inconsistent adjudications which somehow make the Injunction in this case particularly offensive to the holding in *Donovan*. As UNC more fully has set forth in its jurisdictional statement herein, the issues involved in those arbitration proceedings have nothing to do with the Injunction in this case and are distinct from the controversy between UNC and GAC in the Santa Fe Court.

Why, we inquire, would a decision that the 1973 Uranium Supply Agreement is void by reason of Gulf's antitrust activities, be inconsistent with a decision in the Commonwealth arbitration that GAC was not released from the Commonwealth contract by reason of Commonwealth's delays? Obviously, it would not.

Should the Duke arbitration panel hold the GAC-Duke contract in all respects valid and enforceable in accordance with its terms, yet the Santa Fe Court hold the 1973 Uranium Supply Agreement void because procured by fraud and

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[20] GAC's statements in paragraph 1.C. at page 20 of its Petition are partially misleading. UNC would concur that "jurisdiction had already attached *as to GAC* in the action brought by I&M against GAC in New York, before the Injunction was issued" (emphasis added). However, there is no support for GAC's following statement to the effect that there was an "I&M-GAC-UNC contract controversy" in that New York forum, at least in a jurisdictional sense.

coercion, wherein would be the inconsistency? What would be the virtue of trying out the long-standing issues between GAC and UNC concerning the Supply Agreement in the Duke arbitration (and presumably the Commonwealth arbitration as well) when they are already pending and on the eve of trial in Santa Fe? The true danger of inconsistent verdicts would then arise — one answer regarding the Supply Agreement in the arbitration, another in the lawsuit, and Duke not directly concerned with the issue in either.

The Santa Fe Court has given GAC no reason to believe that it will attempt to hold the Commonwealth contract enforceable or unenforceable *as between Commonwealth and GAC* in the former's absence. Even if it proceeded to do something so unusual, how could Commonwealth be bound or benefitted? The spectre of inconsistent verdicts raised by GAC depends on assumptions contrary to sound jurisprudence. UNC submits that the orderly processes of law require the parties to proceed upon the assumption that the Santa Fe Court will make findings of fact in accordance with the evidence, correctly apply the law to them, and fashion appropriate relief.

It is true that the Santa Fe Court denied GAC's motion to dismiss or sever issues relating to Duke and Commonwealth. While the court did not state the reasons for its ruling, UNC supposes that it was because the issues in the Santa Fe case are those between UNC and GAC and are different from those in the arbitrations. In any case, those were prime grounds for denial of that motion advanced by UNC.

The dismissal of the I&M case in the United States District Court for the Southern District of New York does not support GAC's claims of possible prejudice as a result of the Injunction. Judge Frankel's opinion dismissing that case (Appendix E to Petition) reveals that his decision was predicated upon special circumstances, included among which was the fact that a case was pending between UNC and I&M in the Federal District Court in New Mexico involving similar issues to that pending between I&M and GAC in New York. Moreover, GAC had, in the interval, sought to

intervene in the UNC-I&M action and to add I&M as a party in the Santa Fe case. None of these features appertain to either Duke or Commonwealth.

Nothing said in Judge Frankel's second opinion retreats from the statement he made in the first[21] that inconsistent verdicts are an "unlikely prospect", or the description of the issues, quoting with approval from one of the briefs:

> "'The central substantive issue in this case is whether GAC must provide uranium to I&M under the I&M-UNC Contract. The central issue as between GAC and UNC is whether under the agreement between them [to which I&M is not a party, upon which the rights of I&M are in no way dependent, and which has generated an array of issues having no connection with I&M] UNC must provide GAC with the uranium it needs to perform its obligations under the I&M-UNC Contract.'" (Appendix III to Prior Opposition, p. A-5 at 6).

CONCLUSION

As UNC has already more fully set forth (*see* Prior Opposition, pp. 27-28), GAC's continued assertion that it has been denied the right to defend itself vis-a-vis UNC and the issues presented in the Santa Fe Court is without merit. The Santa Fe Court's finding that the institution of any actions by GAC against UNC with regard to claims relating to the subject matter of the Santa Fe lawsuit, would only be "vexatious and harassing" remains unchallenged. There is nothing in the Constitution nor in notions of federal supremacy which prevents a state court from enjoining a party subject to its jurisdiction from abusing the right of access to the courts.

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[21] An earlier Rule 19 Motion by GAC in that case was denied on September 9, 1976 (*see* Appendix E to Petition, p. 1).

Based upon the foregoing, we respectfully submit that the Petition for Certiorari should be denied.

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June 24, 1977

APPENDICES

APPENDIX A

November 30, 1976

Chief Justice LaFel E. Oman
P. O. Box 848
Santa Fe, New Mexico 87501

Re: General Atomic Company v. Hon. Edwin L. Felter, District Judge, New Mexico Supreme Court Cause No. 10870

Dear Chief Justice Oman:

On June 16, 1976 the New Mexico Supreme Court quashed an alternative writ in the above case as having been improvidently issued. Thereafter, a petition for writs of certiorari was filed by General Atomic Company in the United States Supreme Court. (No. 76-385)

On November 29, 1976 the United States Supreme Court granted certiorari, vacated your judgment and said, inter alia:

> "• • • the case is remanded to the Supreme Court of New Mexico to consider whether the judgment is based upon federal or state grounds, or both."

Whether adequate state ground existed to support the New Mexico Supreme Court's order of June 16, 1976 was an issue argued by the parties in the certiorari proceeding. To set forth the presentation of this issue to the United States Supreme Court by the parties and for the convenience of the Court, I transmit herewith five copies of each of the briefs filed by the parties in the certiorari proceedings.

We gather that the question posed by the United States Supreme Court to Your Honors merely requires some sort of statement or certificate responding to the query. See *Whitney v. California*, 274 U.S. 357, 361. *Cf. Department of Mental Hygiene v. Kirchner*, 400 P.2d 321 (Cal. 1965) In any event, I am not sure whether counsel can be of aid to the Court by further briefing or argument, since the answer to the question propounded already exists in the minds of the members of the deciding panel. However, should the Court believe that further action by counsel would be of aid to it, we stand ready to brief and argue any matter which the Court might designate on a short day. We are very much aware of the pending departure of Justice Montoya.

Very truly yours,

/s/ HARRY L. BIGBEE

Harry L. Bigbee

HLB:rm

Enclosures

cc: Montgomery, Federici, Andrews & Hannahs
Rodey, Dickason, Sloan, Akin & Robb
Modrall, Sperling, Roehl, Harris & Sisk

APPENDIX B

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December 6, 1976

The Hon. Chief Justice LaFel E. Oman
Supreme Court of New Mexico
Supreme Court Building
Santa Fe, New Mexico 87501

Re: General Atomic Co. vs. Honorable Edwin L. Felter, District Judge, New Mexico Supreme Court, Case No. 10870

Dear Chief Justice Oman:

We have received a copy of Mr. Bigbee's letter to you dated November 30, 1976. We are writing this letter to state our views as to the proceedings that might appropriately be followed in this Court upon issuance and receipt of the mandate of the United States Supreme Court in the above-captioned case. As pointed out in Mr. Bigbee's letter, the United States Supreme Court's Order, dated November 29,

1976, granted General Atomic Company's ("GAC") petition for certiorari, vacated the judgment and remanded the case to this Court. That Court's mandate is expected to issue later this month.

We disagree with the suggestion in Mr. Bigbee's letter that this Court should act informally and without further proceedings. We also believe it is both necessary and proper to await the mandate of the Supreme Court of the United States.

The United States Supreme Court's Order emphasizes that Court's concern with actions that disturb the comity normally obtaining between the state and federal judicial systems.* We believe that the United States Supreme Court's Order also evidences that Court's desire to have the benefit of the views of this Court in a full and considered opinion discussing the basis for and the merits of the Injunction, not merely some sort of informal statement or certificate.**

---

*The United States Supreme Court has also granted certiorari in *Vendo Co. vs. Lektro-Vend Corp.*, 1976-1 Trade Cases, CCH ¶60919, ___ F.2d __ (7th Cir. 1976); cert. granted, _____ U.S. _____ (1976), 45 L.W. 3249 (Docket No. 76-156).

**The importance of careful consideration and a full opinion in response to the United States Supreme Court's remand is apparent from the cases cited in Mr. Bigbee's letter. In *Whitney v. California*, 274 U.S. 357, the California Supreme Court followed an informal procedure to show that a federal question had been considered. Although the United States Supreme Court gave effect to that informal order, it disapproved the procedure followed, stating:

> "The unusual course here taken to show that Federal questions were raised and decided below is *not* to be commended." 274 U.S. at 361 (emphasis added)

A more circumspect procedure was followed in *Department of Mental Hygiene v. Kirchner*, 400 P.2d 321 (Cal. 1965). There additional proceedings were held on remand, involving additional counsel, and the court rendered a full opinion.

The importance of the Supreme Court's mandate must be emphasized. As a technical matter this Court may lack jurisdiction until the mandate has issued. More important, the mandate of the United States Supreme Court may articulate more fully the further action which that Court desires this Court to take and thus assist this Court and the parties in determining what further proceedings are required on remand. After examining and analyzing the mandate, we believe the parties should be entitled to assist the Court by briefing whatever issues may be posed in the mandate.

Although we believe it would be premature to fully explore the matter, we do respectfully call the Court's attention to the fact that the subject matter of GAC's petition for certiorari was the propriety of Judge Felter's Injunction only in so far as it restrained GAC from initiating proceedings in *federal* courts. In their previous briefs and argument before this Court, both parties addressed *that* issue only as to whether the District Court had jurisdiction under the supremacy clause and *Donovan*. For this reason, we believe it clear that this Court necessarily based its judgment on the federal law grounds. In any case, neither party has briefed in this Court in whole or in part any matter of state law concerning the Injunction's restraint of federal proceedings. In light of the lack of briefing on this point and the United States Supreme Court's Order, we believe that if counsel for UNC now wishes to raise any matter of state law, due process entitles GAC to be afforded the opportunity for briefing the matter.

We join with Mr. Bigbee in desiring consideration by this Court as expeditiously as possible. After all, it is GAC, not Mr. Bigbee's client, that is aggrieved by the Injunction. We also recognize that it would be desirable (although not strictly necessary in a legal sense) if Mr. Justice Montoya, who was on the original panel, could participate in the

remand proceedings.*** However, the parties' desire for expedition should not be so pressed as to deprive this Court of the benefit of briefing, careful consideration and a full opinion by this Court. As noted, the matter involves the sensitive problem of comity between state and federal judicial systems and should be given the time and consideration it deserves.

Respectfully submitted,

RODEY, DICKASON, SLOAN, AKIN & ROBB

By /s/ JOHN ROBB
John Robb

MONTGOMERY, FEDERICI, ANDREWS & HANNAHS

By /s/ WILLIAM R. FEDERICI
William R. Federici

cc: Mr. Harry L. Bigbee

***In both *California v. Krivda*, 409 U.S. 33 (1972), cited by the U.S. Supreme Court in this matter, and in *Department of Mental Hygiene v. Kirchner, supra*, there was a change in the personnel of the California Supreme Court between the time of the original decision and the decision after remand by the U.S. Supreme Court.

APPENDIX C

Excerpts from Transcript of Proceedings on April 2, 1976 in Santa Fe, New Mexico Before the District Court of the State of New Mexico, County of Santa Fe Judge Edwin L. Felter.

Mr. Thompson: The next point — at this point, we would like to ask for clarification. I have also raised the question of the possibility of the Defendants desiring to exercise their rights to arbitration in this case, under Article 17 of the Contract, which is in issue in this case.

The Court: Subject to the supervision of this court.

Mr. Thompson: That is correct. We would ask that the Injunction be clear in excluding any prohibition against us demanding arbitration in this case.

Mr. Bigbee: It is clear enough anyway, anything they want to file in this action will be subject to your Honor's decision.

The Court: Did you, Mr. Bigbee, in your application for a Preliminary Injunction contemplate that the Defendants be enjoined from arbitrating under the Arbitration Clause of the Contract in this form [sic] (forum) subject to the jurisdiction of this court?

Mr. Bigbee: I did not. I understood that it may or may not come up. I have asked repeatedly if they want arbitration, they have never answered me; I think they waived it. That is not the point that I wanted an Injunction on. Anything they want to submit under their responsive pleadings, under the rules, they are entitled to do it.

Supreme Court, U. S.
FILED
JUL 27 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1976

No. 76-1640

GENERAL ATOMIC COMPANY, A partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,

Petitioner,

vs.

THE HONORABLE EDWIN L. FELTER, District Court Judge for the First Judicial District, Santa Fe County, New Mexico,

Respondent.

GENERAL ATOMIC COMPANY, A partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,

Petitioner,

vs.

UNITED NUCLEAR CORPORATION,

Respondent.

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

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July 27, 1977

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PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

Statement

In its Opposition, UNC* argues:

(a) Although GAC and its constituent partners remain subject to a state court Injunction barring it from asserting claims, cross claims or third party

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* "UNC" and other terms used in this Reply are defined in the Petition.

claims relating to the subject matter of the Santa Fe litigation against UNC in federal courts and in arbitrations ordered by federal courts, this case somehow is moot because one of the actions brought by the utilities against GAC has been dismissed (Opposition, pp. 3-6); and

(b) Although GAC has consistently asserted the right to compel UNC to arbitrate and has repeatedly complained that the Injunction will prejudice its rights in ongoing, as well as contemplated, arbitration proceedings, GAC and its partners are barred from pressing these claims before federal courts because it failed to cite the Federal Arbitration Act in proceedings below and in its Prior Petition which was granted by this Court (Opposition, pp. 6-11).

UNC erects these procedural hurdles to review by this Court—just as it raised other erroneous procedural objections to GAC's Prior Petition*—in a continuing attempt to thwart this Court's review of an injunction that is plainly inconsistent with the Supremacy Clause of the Constitution and this Court's decision in *Donovan* v. *Dallas*, 377 U.S. 408 (1964). All UNC's arguments lack merit.

Argument

GAC's Claim is Not Moot

Citing only *DeFunis* v. *Odegaard* (Opposition, p. 5), UNC suggests that GAC's claim is moot and that this Court therefore lacks jurisdiction to entertain GAC's claim. UNC's position is based upon a false factual premise, receives no support from the *DeFunis* decision* and is contrary to established principles of mootness law.

* This Court granted the Prior Petition, vacated and remanded the case to the Supreme Court of New Mexico for a determination whether its judgment was based on state or federal grounds. The New Mexico Supreme Court unequivocally rejected UNC's position that the New Mexico Supreme Court's judgment had been based on state grounds. *Compare* Petition, Appendix D, pp. 7-10, and Opposition, pp. 2, 20-29, *with* Prior Opposition, pp. 3-5.

As factual support for its position that the Injunction no longer has any effect on GAC's right to institute an action in federal court, UNC asserts that "[n]owhere . . . does GAC claim, or even imply, that it would now institute additional litigation" (Opposition, p. 3). UNC then argues that the action by I&M in the United States District Court for the Southern District of New York was the only federal suit in which GAC's rights as a defendant have been prejudiced by the Injunction and that the dismissal of that action moots GAC's claim that the Injunction unconstitutionally interferes with its ability to defend itself in other federal proceedings (Opposition, pp. 4-5).

UNC's statements are erroneous. UNC is well aware that GAC would assert claims against UNC in federal proceedings but for the Injunction—indeed, UNC obtained the Injunction precisely to prevent GAC from asserting such claims. As UNC stated in the Prior Opposition (p. 11), "GAC, in its response to the application for injunction, admitted its intention to join UNC in an arbitration action between Duke Power and GAC and in any actions or arbitration proceedings between GAC and any of the utilities" (*see* Prior Opposition, p. 19). The Supreme Court of New

* This case bears no relationship to *DeFunis*. In *DeFunis* the petitioner, who challenged a law school's admission procedure, had been admitted to law school pursuant to an injunction. At the time of this Court's consideration of the case, petitioner was in his last term of law school and had been guaranteed the right to complete his course of studies. The Court found that "DeFunis will never again be required to run the gauntlet of the Law School's admission process, and so the question is certainly not 'capable of repetition' so far as he is concerned." *DeFunis* v. *Odegaard*, 416 U.S. 312, 319 (1974).

By contrast, GAC is now and will be for some time in the midst of numerous federal and state lawsuits and arbitration proceedings involving UNC and four utilities with respect to approximately $1 billion in disputed uranium fuel contracts. Not only are GAC's rights currently being prejudiced by the Injunction but its rights are certain to be prejudiced in the future as the litigation continues to unfold (*see* Petition, pp. 11-15 and *infra*, pp. 4-13).

Mexico found that UNC requested and obtained the Injunction "after learning that GAC would try to bring UNC into the I&M suit and *the Duke arbitration case and any other suit involving the utilities.*'"* The Duke arbitration was permitted to proceed in the absence of UNC over GAC's objection only after a United States District Court found that UNC, as a guarantor of the Duke contract, was a proper, although not necessary, party that could not be joined because of the Injunction.** *General Atomic Co.* v. *Duke Power Co.*, 420 F. Supp. 215, 217 (W.D.N.C. 1976).

GAC's Petition and Prior Petition likewise demonstrate that GAC has been barred from instituting federal proceedings to compel UNC to arbitrate in the Commonwealth and Duke disputes and that GAC would seek to do so in the absence of the Injunction (*see* Prior Reply, p. 8; Petition, p. 15 n.*). The Petition in particular emphasized that GAC is suffering ongoing harm because of its inability to bring UNC into the arbitration required by the North Carolina federal court. This injury to GAC might still be rectified or mitigated in that proceeding or in related litigation if the Injunction were overturned. A similar situation obtains in the Commonwealth dispute, in which the Illinois federal court directed both GAC and UNC to arbitrate with Commonwealth, but in which the Injunction prevents GAC from seeking in that federal court to compel UNC to arbitrate the disputes between UNC and GAC relating to the Commonwealth contract.

The present posture of the New Mexico action itself refutes UNC's claim of mootness. Proceedings in the New Mexico state court have not yet reached the trial stage. If this Court should determine that the Injunction is

* Petition, Appendix D, pp. 4-5 (emphasis added).

** UNC's attempt to show that it has no contractual relationship with Duke (Opposition, p. 15) is flatly inconsistent with the court's finding that UNC made a "contract" with Duke and remains "a guarantor" of GAC's obligations to Duke. *General Atomic Co.* v. *Duke Power Co.*, 420 F.Supp. 215, 216-17 (W.D.N.C. 1976).

improper, GAC would request the Santa Fe Court to reconsider various procedural rulings which were predicated on the erroneous assumption that the Injunction was valid. Simply as an example, the Santa Fe Court might well on reconsideration grant GAC's motion to dismiss the issues raised by UNC's pleadings regarding GAC's obligations to Commonwealth (*see* Petition, p. 15), recognizing that with GAC no longer enjoined from asserting claims against UNC in the pending Commonwealth arbitration, those issues would best be tried in the single forum where a final, consistent result could be obtained binding on GAC, GAC's customer and GAC's supplier.

In short, UNC's position that a decision by this Court holding the Injunction improper "will have no effect on the rights of either party in this case" (Opposition, pp. 3-4; *see* Opposition, p. 5) plainly is incorrect. It also is rather surprising, in view of UNC's substantial, and thus far successful, efforts to obtain and defend the Injunction in the state courts and to avoid review of the Injunction on the merits in this Court.*

* Even if the Injunction were not now prejudicing GAC in these ongoing controversies, GAC's claims would not be moot. While as GAC stated in its Petition, given the breadth of the Injunction "[i]t is impossible to enumerate in advance all possible occasions in which GAC or its constituent partners may need to exercise their rights to assert claims in federal proceedings" (Petition, p. 20 n.*), the Injunction by its terms restricts their ability, with respect to the subject matter of the Santa Fe litigation, to (a) *sue UNC* in federal court; (b) bring a third party claim against UNC in federal court; (c) *sue UNC* in federal court to compel arbitration; and (d) *sue UNC* in federal court in proceedings to enforce an arbitration award. For example, Detroit might well institute an action against GAC in federal court if it succeeds on its jurisdictional appeal in the New Mexico courts (*see* Petition, pp. 12-13). The harm already caused to GAC and its partners by the Injunction is thus not only "capable of repetition yet evading judicial review" but virtually certain to recur, placing this case squarely within a well recognized exception to the mootness doctrine. *See, e.g., Nebraska Press Association* v. *Stuart*, 427 U.S. 539 (1976); *Roe* v. *Wade*, 410 U.S. 113, 124-25 (1973); *Dunn* v. *Blumstein*, 405 U.S. 330, 333, n.2 (1972); *Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969); *Carroll* v. *Princess Anne*, 393 U.S. 175, 178-79 (1968); *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953); *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911).

GAC is Not Precluded from Claiming that the Injunction Deprives It of the Right to Resort to Federal Court to Enforce Its Arbitration Rights

UNC argues that this Court may not consider the fact that one effect of the Injunction is to bar GAC and its partners from instituting or asserting claims in federal proceedings to enforce arbitration agreements or awards. UNC relies heavily on the fact that GAC has not cited the Federal Arbitration Act in the state courts or in the Prior Petition.

UNC's argument is baseless.

First, UNC concedes (*see* Opposition, pp. 2-4) that GAC has consistently asserted before the New Mexico state courts and in the Prior Petition that the Injunction is unconstitutional and improper because:

> (a) it bars GAC and its constituent partners from instituting federal proceedings against UNC relating to the subject matter of the Santa Fe litigation; and
>
> (b) it bars GAC and its constituent partners from instituting third party claims against UNC when they are sued in federal proceedings with respect to the subject matter of the Santa Fe litigation.

Federal lawsuits (or third party claims in federal proceedings) to compel UNC to participate in arbitration of the uranium claims clearly are within the scope of the questions GAC has consistently raised.

Second, GAC has specifically raised the pernicious effect of the Injunction on its arbitration rights at every stage of the proceedings leading to the Petition. It did so before Judge Felter who issued the Injunction,* before the Supreme Court of New Mexico,* and in the Prior Petition before this Court.** Since the Supreme Court of New Mexico found that the Injunction was requested and issued in part because UNC "learned that GAC would try to bring UNC into . . . the Duke arbitration case", there can be no question that the state courts, in upholding the Injunction, were aware of, and rejected, GAC's claim that it was entitled to assert claims against UNC in arbitration proceedings.† Indeed, since UNC used GAC's expressed intention of joining UNC in the Duke arbitration to convince the New Mexico courts to issue the Injunction, UNC should not be heard to say that GAC's arbitration rights cannot be considered in reviewing the validity of the Injunction.

Third, having conceded that GAC has demanded arbitration against it, UNC then goes to great lengths to show that the Injunction did not bar GAC from asserting arbitration claims *in the New Mexico trial court* (Opposition, pp. 7, 18). There is no question, however, that the Injunction does bar GAC from initiating any *federal* action to enforce its arbitration rights against UNC. And because of the

* *See* Prior Reply, Appendix D, and GAC Response to Motion for Preliminary Injunction and attached Affidavit of A.A.H. Koch, Manager, Special Projects, Uranium and Light Water Fuel Division of GAC, dated March 23, 1976. (A copy of the Response has been lodged with the Clerk of this Court).

* Brief of Petitioner GAC in the Supreme Court of New Mexico, pp. 11-12; Reply Brief of Petitioner GAC in the Supreme Court of New Mexico, p. 9. (A copy of these Briefs has been lodged with the Clerk of this Court).

** Prior Reply, pp. 4, n.** and Appendix D, p. 1.

† Nothing in the cases cited in the Opposition (*see* pp. 9-10), suggests that GAC, having clearly and unequivocally raised the effect of the Injunction on arbitration proceedings, should be precluded from asserting it now. In *Michel* v. *Louisiana,* 350 U.S. 91 (1955), the Court sustained a state court decision that the petitioner had waived his objection to the composition of the Grand Jury by failing to object within the time allowed by state statute. In *Brown* v. *Allen,* 344 U.S. 443, 480 (1953), the Court stated that evidence known to the defendant and withheld in state criminal proceedings could not later be used to support a federal habeas corpus petition. And *F.D. Rich Co.* v. *Industrial Lumber Co.,* 417 U.S. 116, 121, n.6 (1974), and *Irvine* v. *California,* 347 U.S. 128, 129 (1954), involved briefing and argument of new and separate issues not even hinted at in the petitions granted by this Court.

pending utility arbitrations, *federal* proceedings, in forums outside New Mexico, are necessary to enforce GAC's arbitration rights.

GAC's demand for arbitration against UNC (reproduced in Appendix A hereto) sought arbitration of "only those issues which General Atomic is ultimately required to arbitrate with Duke and Commonwealth Edison", pursuant to arbitrations demanded by those two utilities and required by federal courts in North Carolina and Illinois. GAC could not effectively "[prosecute] the demand for arbitration contained in its Answer" in the Santa Fe Court (Opposition, p. 18) for the obvious reason that the Duke and Commonwealth arbitrations are pending in other jurisdictions, pursuant to orders of federal courts.

By limiting GAC to asserting its arbitration claims in the Santa Fe Court, the Injunction deprives GAC of its right adequately to defend itself in ongoing arbitration proceedings by invoking federal court enforcement of its arbitration rights.

Fourth, GAC has consistently argued the Supremacy Clause and *Donovan* issues broadly—in terms of its right of access to federal proceedings. GAC has never purported to enumerate all of the various claims it may be entitled to assert in such proceedings, nor is it required to do so.* The Supremacy Clause and the *Donovan* decision— as GAC has argued vigorously from the outset—entitle GAC to have access to federal court proceedings to assert whatever

* In view of the extremely broad prohibitions of the Injunction—for which UNC is directly responsible—and the complexity of the UNC-GAC-utility disputes—considerably magnified by the effect of the Injunction—it is unfair for UNC to complain that GAC should be required exhaustively to detail all possible respects in which the Injunction conflicts with rights under the Supremacy Clause.

claims it may have, including claims under the Federal Arbitration Act.*

The Injunction is Inconsistent with the Supremacy Clause and This Court's Decision in Donovan

UNC persists in attempting to distinguish *Donovan* on the grounds that jurisdiction *over UNC* had not attached in any federal forum affected by the Injunction when it was issued (Opposition, pp. 28-29). This "distinction" is contrary to both the holding and rationale of *Donovan,* as GAC has repeatedly demonstrated.** Even if UNC's distinction had significance, however, it could not be applied to deprive GAC as an *unwilling defendant* in a federal suit—or in an arbitration conducted pursuant to federal court order—of the procedural and substantive rights that would be available absent the Injunction. The Constitution simply does not permit the state judiciary to deprive a defendant in federal proceedings of the benefits of federal laws, rules and precedents uniformly available to all other federal litigants.

* It should also be noted that although GAC suggested that the Supreme Court of New Mexico permit the parties to file briefs following this Court's remand, the New Mexico Supreme Court did not do so. The lack of briefing in the Supreme Court of New Mexico on remand deprived GAC of an opportunity specifically to brief the Federal Arbitration Act claims and may also explain some of the New Mexico Supreme Court's surprising factual errors. *Compare* Petition, p. 19, n.**, *with* Opposition, pp. 20, 27 n.19.

** GAC has pointed out that in *Donovan* this Court overturned contempt citations based solely on the institution of new federal litigation after an injunction had issued (Prior Petition, pp. 16-19; Prior Reply, pp. 11-12; Petition, pp. 17-18). For the first time, UNC attempts to deal with, rather than ignore, this crucial point. UNC appears to argue (Opposition, p. 25) that *those* contempt citations were perfectly proper but that this Court nevertheless overturned them for unexplained reasons of "judicial administration". This odd supposition appears to assume that *all* of the contempt citations were based on the "erroneous decision" of the Texas Supreme Court that an injunction enjoining *pending* litigation was proper. The plain fact is, however, that the Texas Supreme Court had also explicitly ruled that an injunction could issue against the institution of *new* litigation, *City of Dallas* v. *Dixon,* 365 S.W.2d 919, 926-27 (Tex. 1963), and the injunction against such new litigation was of course predicated on *that* ruling.

UNC also advances the extraordinary assertion that GAC could have protected its rights if it had "expanded" and "restructured" the interpleader action and the Gulf declaratory judgment action so as "to bring the issue presented in the Santa Fe case squarely under one federal roof" (Opposition, pp. 18-20; *see* Opposition, p. 28). UNC's argument is absurd. The avowed purpose of the Injunction was to preclude GAC and its constituent partners from asserting any claims against UNC relating to the subject matter of the Santa Fe litigation anywhere but in the Santa Fe Court. The terms of the Injunction in no way left GAC free to "restructure" or "expand" the two federal actions.

The terms of the Injunction permitted only "Gulf Oil Corporation" to prosecute the declaratory judgment action, which in any event concerned only the narrow issue of the validity of the release given by UNC to Gulf, an issue in which the utilities were not involved (Petition, Appendix A, p. 3). And the terms of the Injunction permitted only "the prosecution of [the] appeal" in the interpleader action, which had been dismissed for lack of statutory jurisdiction *before the issuance of the Injunction (Id.).** Thus, GAC had no federal forum "in which all of its claims could have been presented" as asserted by UNC (Opposition, p. 28).

But the most important point is that UNC's argument misconstrues GAC's position. Although GAC would much prefer a single forum in which resolution of all issues could be binding on all parties (and actively sought such a forum until successfully resisted by UNC and the utilities), it is now painfully apparent that GAC will be a defendant in multiple proceedings raising important issues identical

* In any event, GAC could not have asserted claims therein based on diversity of citizenship between GAC and UNC—a fact UNC relied on to prevent removal of the Santa Fe action (*see* Prior Petition, p. 9; Prior Opposition, p. 9 and n.7).

to those in the New Mexico state court litigation. Unless UNC can be made a party in each of these proceedings, there is no guarantee that UNC will be bound by adjudications therein, and there is of course no assurance that the issues will be resolved in the same way as in the Santa Fe Court (Prior Petition, pp. 13-15; Prior Reply, pp. 9-11; Petition, pp. 8, 20-22).

It is simply sham for UNC to suggest to this Court that the issues raised in the Santa Fe action are unrelated to the disputes between the utilities and GAC (Opposition, pp. 29-31).* One of UNC's basic positions in Santa Fe is that even if it remains obligated to GAC under the 1973 Uranium Supply Agreement (which it denies), its obligations to deliver uranium to GAC are limited to whatever amount of uranium GAC is obligated to deliver to the utilities, including Commonwealth and Duke.** Thus, UNC's

* UNC asserts that Gulf agreed to indemnify UNC against claims and liability under UNC's guaranty of the utility contracts (Opposition, pp. 15-17). UNC omits to mention that Gulf and UNC specifically *exempted* from such indemnity "anything resulting by reason of any breach by UNC" of, *inter alia*, the 1973 Uranium Supply Agreement (listed in Exhibit C to the Buy-out Agreement). Of course, it is precisely UNC's breach of the 1973 Uranium Supply Agreement that is at the heart of the entire controversy.

** UNC points out (Opposition, pp. 14-15) that the 1973 Uranium Supply Agreement contains not only a "requirements" (Art. IV) but also a "fixed supply" (Art. V) UNC delivery obligation. UNC omits to mention that the "fixed supply" provision was insisted on by UNC (before the rise in the market price of uranium), in order that UNC might be assured of a market for the output of its mining operations with respect to utility uranium requirements which in 1973 were scheduled for delivery after 1978.

While Article IV obligates UNC to deliver uranium to GAC strictly on the basis of utility requirements and Article V obligates UNC to deliver uranium to GAC regardless of utility requirements, the utilities in fact assert that they require both Article IV and Article V uranium and insist on delivery of such uranium to them. At the same time, UNC asserts that it is not obligated to deliver either Article IV or Article V uranium to GAC because the utilities do not require or are not entitled to such uranium. These conflicting claims by UNC and the utilities concerning the requirements and entitlements of utilities to such uranium represent critical issues common to all of the proceedings against GAC as to which GAC faces the threat of inconsistent adjudication.

Amended Complaint alleges that "as shown by [the 1973 Uranium Supply Agreement], [UNC] was only to furnish those requirements of utilities for uranium for the purpose specified in the contracts with the utilities" and indeed alleges that it is fraudulent for GAC to assert that UNC is required "to deliver the uranium whether or not said uranium is required to be delivered to the utilities" (Amended Complaint, Count I, ¶ 56).* UNC further contends that the utilities are not entitled to obtain delivery of uranium pursuant to the utility contracts (*i.e.*, the very issue involved in the arbitrations) and that UNC is therefore excused from delivering any uranium under either the utility contracts or the 1973 Uranium Supply Agreement by reason, *inter alia*, of the fact that certain utilities obtained deliveries of uranium to which they were not entitled, of undue delivery deferrals, of mutual mistake of fact and commercial impracticability based upon increases in uranium prices, and of force majeure conditions (*see, e.g.*, Amended Complaint, Count I, ¶ 63, Count II, ¶¶ 2-8).**

It is also false for UNC to suggest that there are no controversies between UNC and the utilities (Opposition, p. 19). There is litigation pending between UNC and three of the four utilities.†

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* A copy of the Amended Complaint has been lodged with the Clerk of this Court.

** UNC allegations to the effect that it is entitled to negotiate independently with the utilities as to terms, price and quantity of uranium deliveries, and to full market price for uranium under the I&M contract based upon changes in conditions assumed by the parties, further illustrates the interrelationship of UNC's claims and claims by the utilities. *See, e.g.*, Amended Complaint, Count I, ¶¶ 60, 61, 63.

† *I&M:* UNC sued I&M to avoid performance under the UNC-I&M Contract, alleging that it is excused from performance to I&M on many of the same grounds asserted by UNC in Count II of its Amended Complaint. I&M counterclaimed, seeking specific performance by UNC. *See* Petition, p. 10, n.*.

(Footnote Continued on Page 13)

As both the Tenth Circuit and Judge Frankel recognized (Petition, pp. 11-12, and Appendix E, pp. 4, 6), GAC is in fact subject to a substantial risk of inconsistent adjudications on the same or similar issues. GAC's position is that it is entitled to invoke the aid of the federal courts to assert its claims against UNC in each forum where controversies relating to the subject matter of the Santa Fe litigation will be adjudicated.* Only then can GAC attempt to achieve protection against inconsistent adjudications. The Injunction improperly and unconstitutionally prohibits GAC from seeking such protection in each of the forums having responsibility for a part of the overall controversy. As such, it is an affront to federal supremacy.

Commonwealth: Commonwealth has demanded arbitration against UNC as well as GAC. *See* Petition, pp. 13-14.

Detroit: Detroit has recently cross-claimed against UNC in the Santa Fe action, seeking a declaration that UNC is obligated to deliver uranium to Detroit.

* The Supreme Court of New Mexico in its opinion on remand from this Court recognized GAC's position to be precisely that stated in the text (Petition, Appendix D, pp. 4-5). Although the New Mexico trial court concluded that such future proceedings would be "vexatious, harrassing and multiplicitous", there are no factual findings adequate to support that conclusion. GAC maintains that its intent to join its supplier UNC in any of the uranium contract disputes where GAC is made a defendant by a utility customer cannot as *a matter of law* constitute harrassment by it. In any event, as the dissent in *Donovan* so eloquently pointed out, the Court's holding in *Donovan* makes harassment irrelevant. The state courts in *in personam* actions are simply without power to enjoin a party from resorting to the federal courts.

It is particularly captious for UNC to assert GAC harassment of UNC where (a) UNC originally entered into contracts with each of the utilities; (b) UNC remains directly liable to the utilities on three of the five contracts and guaranteed performance of all of the contracts in question; (c) under the 1973 Uranium Supply Agreement, UNC's obligations to GAC are for the most part defined in terms of GAC's obligations to supply uranium under the utility contracts; and (d) GAC simply seeks to join UNC in proceedings where GAC itself has been sued by a utility. *See* Prior Reply, pp. 7-9.

Conclusion

For the reasons stated above and in GAC's Petition, Prior Petition and Prior Reply, the writ should be granted and the order of the New Mexico Supreme Court summarily reversed.

Respectfully submitted,

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APPENDIX A

Excerpt from Answer of General Atomic Company to Amended Complaint

Eighth Defense

Some of the issues in this case are subject to arbitration pursuant to Article XVII of the Uranium Supply Agreement of 1973 (Exhibit 5 to the Complaint). In addition, United is bound by the arbitration provisions of the Duke contract and the two Commonwealth Edison contracts. Commonwealth Edison has demanded arbitration of certain issues pursuant to the arbitration provision of the La Salle Contract. Commonwealth Edison may demand arbitration pursuant to the provisions of the Dresden Contract. Duke has demanded arbitration of certain issues pursuant to the arbitration provision of the Duke Contract. United's obligations to General Atomic may be affected by the resolution of the issues with respect to which Duke and Commonwealth Edison have demanded and may demand arbitration. General Atomic is currently opposing arbitration with both Commonwealth Edison and Duke. United is a party to Commonwealth Edison's arbitration demand and is also opposing that arbitration. General Atomic demands arbitration of only those issues which General Atomic is ultimately required to arbitrate with Duke and Commonwealth Edison pursuant to the above contracts, and which also can be arbitrated jointly among United, General Atomic and the respective utility.

Specifically excluded from the scope of this arbitration demand are all other arbitrable issues, including any concerning the validity and enforceability of the 1973 Uranium Supply Agreement.

To the extent possible, General Atomic Company intends to conduct the arbitration of the issues demanded above jointly with the arbitration of the same issues between the respective power companies and itself.